

RESPONSIBLY AND PROFESSIONALLY INVIGORATING DEVELOPMENT (RAPID) ACT OF 2013

HEARING
BEFORE THE
SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED THIRTEENTH CONGRESS
FIRST SESSION
ON
H.R. 2641
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**RESPONSIBLY AND PROFESSIONALLY INVIG-
ORATING DEVELOPMENT (RAPID) ACT OF
2013**

THURSDAY, JULY 11, 2013

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:02 a.m., in room 2141, Rayburn Office Building, the Honorable Spencer Bachus (Chairman of the Subcommittee) presiding.

Present: Representatives Bachus, Goodlatte, Marino, Cohen, Johnson, DelBene, and Jeffries.

Staff present: (Majority) Daniel Flores, Chief Counsel; Ashley Lewis, Clerk; Jaclyn Louis, Legislative Director to Mr. Marino; Sarah Vanderwood, Legislative Assistant to Mr. Holding; and (Minority) James Park, Minority Counsel.

Mr. BACHUS. Good morning. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law hearing will come to order.

Without objection, the Chair is authorized to declare a recess at any time.

We welcome all our witnesses today.

We are going to have votes on the floor, which we normally do not have on a Thursday, but the Farm Bill is back. So we do expect to have some interruptions, which we apologize in advance for.

Our format is for opening statements of Members and then the panel. So we will proceed with that.

And at this time, I would like to recognize Mr. Marino, the gentleman from Pennsylvania, who is the sponsor of the bill, for his opening statement.

Mr. MARINO. I would like to reserve my time.

Mr. BACHUS. Let me give my opening statement, and then we will go back and have the sponsor give his opening statement.

Summer is what we usually know as a high time for outdoor construction projects. In fact, it is when you sometimes hear complaints from some people that there is too much construction going on. I am not sure I have heard that anytime lately.

But especially when it comes to roads, each of these projects is creating jobs, improving safety, and modernizing our transportation

system. And let me add as an aside I am also one of those who believes we need to be investing more in our infrastructure.

Unfortunately, there is a big roadblock out there to completing all the work that we desperately need to have done on our highways and roads and bridges. That is an inexcusable slow process imposed by Washington on the permitting of new construction projects. Under the National Environmental Policy Act, Federal agencies must review proposed new projects for environmental impacts and that is fine. But it is unacceptable that the progress has grown to one that drags out for years.

Just this past May we heard that President Obama expressed similar concerns during a speech in Baltimore, and he said, I quote, "One of the problems we have had in the past is that something—sometimes it takes too long to get projects off the ground. There are all these permits and red tape and planning and this and that, and some of it is important to do but we could do it faster."

Quite frankly, it was the original intent that we do it faster. When NEPA was in its infancy, the Council of Environmental Quality promised that under its regulations even large, complex energy projects would require only about 12 months for the completion of the entire process. And that is the environmental impact statement. And now, instead, it sometimes seems incredibly difficult to get permission in a timely manner for even a small project. And when it comes to large projects, such as the construction of the Northern Beltline in the Birmingham area that I represent, the challenges are even greater.

There are some who would argue that current economic reviews is working well and should not be changed. We have a witness today from the National Resources Defense Council who will tell us that if the review process is shortened and streamlined, all important environmental factors might not be taken into account. And I do not begrudge them for that position, but I find it ironic that a witness from the same organization testified here Tuesday that we should not take extra time when it comes to assessing the adverse job impacts of Federal agency decisions. So they were here 2 days ago saying we should get the rules and regs out and not spend time seeing whether there is an impact on jobs. So what needed to be faster on Tuesday needs to slow up on Thursday I guess.

The legislation we are considering today, the RAPID Act, would streamline the permitting process in a way that would still allow all appropriate environmental reviews to be done. It would reduce the time it takes to review new construction projects and ensure that the permitting process is not endlessly held up in the courts.

Let me thank Mr. Marino for re-introducing this legislation. I am proud to be an original cosponsor of his legislation.

This legislation is modeled on the successful permitting streamlining provisions of the recent bipartisan SAFETEA-LU and MAP-21 transportation bills. Both of those transportation reauthorization bills had my strong support and the support of most Judiciary Committee Members on both sides of the aisle. Under SAFETEA-LU alone, the time for completing environmental impact statements has been cut nearly in half, but further reforms are needed and the RAPID Act is a further step forward.

Let me conclude by saying one thing we all agree on, that we need more jobs. Construction jobs can be some of the best paying jobs out there, and when you talk about young people, a summer construction job can be a way to help pay for college. It was for me. I worked every summer for a construction company as I went through Auburn and then 1 year at Alabama Law School. To me, this is a winning piece of legislation that will create jobs, allow a lot of students to help pay for their educations, and others to feed their families and allow us to get on with the urgent task of modernizing our Nation's crumbling infrastructure, whether it is water, sewer, or highways.

And with that, I yield to the Ranking Member of the Subcommittee, Mr. Cohen, who I think is all excited about this bill too. [The bill, H.R. 2641, follows]:

113TH CONGRESS
1ST SESSION

H. R. 2641

To provide for improved coordination of agency actions in the preparation and adoption of environmental documents for permitting determinations, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 10, 2013

Mr. MARINO (for himself, Mr. BACHUS, Mr. COBLE, Mr. FRANKS of Arizona, Mr. SMITH of Texas, Mr. AMODEI, and Mr. OWENS) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Natural Resources, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To provide for improved coordination of agency actions in the preparation and adoption of environmental documents for permitting determinations, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Responsibly And Pro-
5 fessionally Invigorating Development Act of 2013” or as
6 the “RAPID Act”.

1 **SEC. 2. COORDINATION OF AGENCY ADMINISTRATIVE OP-**
2 **ERATIONS FOR EFFICIENT DECISIONMAKING.**

3 (a) IN GENERAL.—Part I of chapter 5 of title 5,
4 United States Code, is amended by inserting after sub-
5 chapter II the following:

6 “SUBCHAPTER IIA—INTERAGENCY
7 COORDINATION REGARDING PERMITTING
8 “§ 560. Coordination of agency administrative oper-
9 ations for efficient decisionmaking

10 “(a) CONGRESSIONAL DECLARATION OF PURPOSE.—
11 The purpose of this subchapter is to establish a framework
12 and procedures to streamline, increase the efficiency of,
13 and enhance coordination of agency administration of the
14 regulatory review, environmental decisionmaking, and per-
15 mitting process for projects undertaken, reviewed, or fund-
16 ed by Federal agencies. This subchapter will ensure that
17 agencies administer the regulatory process in a manner
18 that is efficient so that citizens are not burdened with reg-
19 ulatory excuses and time delays.

20 “(b) DEFINITIONS.—For purposes of this sub-
21 chapter, the term—

22 “(1) ‘agency’ means any agency, department, or
23 other unit of Federal, State, local, or Indian tribal
24 government;

25 “(2) ‘category of projects’ means 2 or more
26 projects related by project type, potential environ-

1 mental impacts, geographic location, or another
2 similar project feature or characteristic;

3 “(3) ‘environmental assessment’ means a con-
4 cise public document for which a Federal agency is
5 responsible that serves to—

6 “(A) briefly provide sufficient evidence and
7 analysis for determining whether to prepare an
8 environmental impact statement or a finding of
9 no significant impact;

10 “(B) aid an agency’s compliance with
11 NEPA when no environmental impact state-
12 ment is necessary; and

13 “(C) facilitate preparation of an environ-
14 mental impact statement when one is necessary;

15 “(4) ‘environmental impact statement’ means
16 the detailed statement of significant environmental
17 impacts required to be prepared under NEPA;

18 “(5) ‘environmental review’ means the Federal
19 agency procedures for preparing an environmental
20 impact statement, environmental assessment, cat-
21 egorical exclusion, or other document under NEPA;

22 “(6) ‘environmental decisionmaking process’
23 means the Federal agency procedures for under-
24 taking and completion of any environmental permit,
25 decision, approval, review, or study under any Fed-

1 eral law other than NEPA for a project subject to
2 an environmental review;

3 “(7) ‘environmental document’ means an envi-
4 ronmental assessment or environmental impact
5 statement, and includes any supplemental document
6 or document prepared pursuant to a court order;

7 “(8) ‘finding of no significant impact’ means a
8 document by a Federal agency briefly presenting the
9 reasons why a project, not otherwise subject to a
10 categorical exclusion, will not have a significant ef-
11 fect on the human environment and for which an en-
12 vironmental impact statement therefore will not be
13 prepared;

14 “(9) ‘lead agency’ means the Federal agency
15 preparing or responsible for preparing the environ-
16 mental document;

17 “(10) ‘NEPA’ means the National Environ-
18 mental Policy Act of 1969 (42 U.S.C. 4321 et seq.);

19 “(11) ‘project’ means major Federal actions
20 that are construction activities undertaken with Fed-
21 eral funds or that are construction activities that re-
22 quire approval by a permit or regulatory decision
23 issued by a Federal agency;

24 “(12) ‘project sponsor’ means the agency or
25 other entity, including any private or public-private

1 entity, that seeks approval for a project or is other-
2 wise responsible for undertaking a project; and

3 “(13) ‘record of decision’ means a document
4 prepared by a lead agency under NEPA following an
5 environmental impact statement that states the lead
6 agency’s decision, identifies the alternatives consid-
7 ered by the agency in reaching its decision and
8 states whether all practicable means to avoid or min-
9 imize environmental harm from the alternative se-
10 lected have been adopted, and if not, why they were
11 not adopted.

12 “(c) PREPARATION OF ENVIRONMENTAL DOCU-
13 MENTS.—Upon the request of the lead agency, the project
14 sponsor shall be authorized to prepare any document for
15 purposes of an environmental review required in support
16 of any project or approval by the lead agency if the lead
17 agency furnishes oversight in such preparation and inde-
18 pendently evaluates such document and the document is
19 approved and adopted by the lead agency prior to taking
20 any action or making any approval based on such docu-
21 ment.

22 “(d) ADOPTION AND USE OF DOCUMENTS.—

23 “(1) DOCUMENTS PREPARED UNDER NEPA.—

24 “(A) Not more than 1 environmental im-
25 pact statement and 1 environmental assessment

1 shall be prepared under NEPA for a project
2 (except for supplemental environmental docu-
3 ments prepared under NEPA or environmental
4 documents prepared pursuant to a court order),
5 and, except as otherwise provided by law, the
6 lead agency shall prepare the environmental im-
7 pact statement or environmental assessment.
8 After the lead agency issues a record of deci-
9 sion, no Federal agency responsible for making
10 any approval for that project may rely on a doc-
11 ument other than the environmental document
12 prepared by the lead agency.

13 “(B) Upon the request of a project spon-
14 sor, a lead agency may adopt, use, or rely upon
15 secondary and cumulative impact analyses in-
16 cluded in any environmental document prepared
17 under NEPA for projects in the same geo-
18 graphic area where the secondary and cumu-
19 lative impact analyses provide information and
20 data that pertains to the NEPA decision for the
21 project under review.

22 “(2) STATE ENVIRONMENTAL DOCUMENTS;
23 SUPPLEMENTAL DOCUMENTS.—

24 “(A) Upon the request of a project spon-
25 sor, a lead agency may adopt a document that

1 has been prepared for a project under State
2 laws and procedures as the environmental im-
3 pact statement or environmental assessment for
4 the project, provided that the State laws and
5 procedures under which the document was pre-
6 pared provide environmental protection and op-
7 portunities for public involvement that are sub-
8 stantially equivalent to NEPA.

9 “(B) An environmental document adopted
10 under subparagraph (A) is deemed to satisfy
11 the lead agency’s obligation under NEPA to
12 prepare an environmental impact statement or
13 environmental assessment.

14 “(C) In the case of a document described
15 in subparagraph (A), during the period after
16 preparation of the document but before its
17 adoption by the lead agency, the lead agency
18 shall prepare and publish a supplement to that
19 document if the lead agency determines that—

20 “(i) a significant change has been
21 made to the project that is relevant for
22 purposes of environmental review of the
23 project; or

24 “(ii) there have been significant
25 changes in circumstances or availability of

1 information relevant to the environmental
2 review for the project.

3 “(D) If the agency prepares and publishes
4 a supplemental document under subparagraph
5 (C), the lead agency may solicit comments from
6 agencies and the public on the supplemental
7 document for a period of not more than 45
8 days beginning on the date of the publication of
9 the supplement.

10 “(E) A lead agency shall issue its record of
11 decision or finding of no significant impact, as
12 appropriate, based upon the document adopted
13 under subparagraph (A), and any supplements
14 thereto.

15 “(3) CONTEMPORANEOUS PROJECTS.—If the
16 lead agency determines that there is a reasonable
17 likelihood that the project will have similar environ-
18 mental impacts as a similar project in geographical
19 proximity to the project, and that similar project
20 was subject to environmental review or similar State
21 procedures within the 5-year period immediately pre-
22 ceding the date that the lead agency makes that de-
23 termination, the lead agency may adopt the environ-
24 mental document that resulted from that environ-
25 mental review or similar State procedure. The lead

1 agency may adopt such an environmental document,
2 if it is prepared under State laws and procedures
3 only upon making a favorable determination on such
4 environmental document pursuant to paragraph
5 (2)(A).

6 “(e) PARTICIPATING AGENCIES.—

7 “(1) IN GENERAL.—The lead agency shall be
8 responsible for inviting and designating participating
9 agencies in accordance with this subsection. The
10 lead agency shall provide the invitation or notice of
11 the designation in writing.

12 “(2) FEDERAL PARTICIPATING AGENCIES.—Any
13 Federal agency that is required to adopt the envi-
14 ronmental document of the lead agency for a project
15 shall be designated as a participating agency and
16 shall collaborate on the preparation of the environ-
17 mental document, unless the Federal agency informs
18 the lead agency, in writing, by a time specified by
19 the lead agency in the designation of the Federal
20 agency that the Federal agency—

21 “(A) has no jurisdiction or authority with
22 respect to the project;

23 “(B) has no expertise or information rel-
24 evant to the project; and

1 “(C) does not intend to submit comments
2 on the project.

3 “(3) INVITATION.—The lead agency shall iden-
4 tify, as early as practicable in the environmental re-
5 view for a project, any agencies other than an agen-
6 cy described in paragraph (2) that may have an in-
7 terest in the project, including, where appropriate,
8 Governors of affected States, and heads of appro-
9 priate tribal and local (including county) govern-
10 ments, and shall invite such identified agencies and
11 officials to become participating agencies in the envi-
12 ronmental review for the project. The invitation shall
13 set a deadline of 30 days for responses to be sub-
14 mitted, which may only be extended by the lead
15 agency for good cause shown. Any agency that fails
16 to respond prior to the deadline shall be deemed to
17 have declined the invitation.

18 “(4) EFFECT OF DECLINING PARTICIPATING
19 AGENCY INVITATION.—Any agency that declines a
20 designation or invitation by the lead agency to be a
21 participating agency shall be precluded from submit-
22 ting comments on any document prepared under
23 NEPA for that project or taking any measures to
24 oppose, based on the environmental review, any per-
25 mit, license, or approval related to that project.

1 “(5) EFFECT OF DESIGNATION.—Designation
2 as a participating agency under this subsection does
3 not imply that the participating agency—

4 “(A) supports a proposed project; or

5 “(B) has any jurisdiction over, or special
6 expertise with respect to evaluation of, the
7 project.

8 “(6) COOPERATING AGENCY.—A participating
9 agency may also be designated by a lead agency as
10 a ‘cooperating agency’ under the regulations con-
11 tained in part 1500 of title 40, Code of Federal Reg-
12 ulations, as in effect on January 1, 2011. Designa-
13 tion as a cooperating agency shall have no effect on
14 designation as participating agency. No agency that
15 is not a participating agency may be designated as
16 a cooperating agency.

17 “(7) CONCURRENT REVIEWS.—Each Federal
18 agency shall—

19 “(A) carry out obligations of the Federal
20 agency under other applicable law concurrently
21 and in conjunction with the review required
22 under NEPA; and

23 “(B) in accordance with the rules made by
24 the Council on Environmental Quality pursuant
25 to subsection (n)(1), make and carry out such

1 rules, policies, and procedures as may be rea-
2 sonably necessary to enable the agency to en-
3 sure completion of the environmental review
4 and environmental decisionmaking process in a
5 timely, coordinated, and environmentally re-
6 sponsible manner.

7 “(8) COMMENTS.—Each participating agency
8 shall limit its comments on a project to areas that
9 are within the authority and expertise of such par-
10 ticipating agency. Each participating agency shall
11 identify in such comments the statutory authority of
12 the participating agency pertaining to the subject
13 matter of its comments. The lead agency shall not
14 act upon, respond to or include in any document
15 prepared under NEPA, any comment submitted by
16 a participating agency that concerns matters that
17 are outside of the authority and expertise of the
18 commenting participating agency.

19 “(f) PROJECT INITIATION REQUEST.—

20 “(1) NOTICE.—A project sponsor shall provide
21 the Federal agency responsible for undertaking a
22 project with notice of the initiation of the project by
23 providing a description of the proposed project, the
24 general location of the proposed project, and a state-
25 ment of any Federal approvals anticipated to be nec-

1 essary for the proposed project, for the purpose of
2 informing the Federal agency that the environmental
3 review should be initiated.

4 “(2) LEAD AGENCY INITIATION.—The agency
5 receiving a project initiation notice under paragraph
6 (1) shall promptly identify the lead agency for the
7 project, and the lead agency shall initiate the envi-
8 ronmental review within a period of 45 days after
9 receiving the notice required by paragraph (1) by in-
10 viting or designating agencies to become partici-
11 pating agencies, or, where the lead agency deter-
12 mines that no participating agencies are required for
13 the project, by taking such other actions that are
14 reasonable and necessary to initiate the environ-
15 mental review.

16 “(g) ALTERNATIVES ANALYSIS.—

17 “(1) PARTICIPATION.—As early as practicable
18 during the environmental review, but no later than
19 during scoping for a project requiring the prepara-
20 tion of an environmental impact statement, the lead
21 agency shall provide an opportunity for involvement
22 by cooperating agencies in determining the range of
23 alternatives to be considered for a project.

24 “(2) RANGE OF ALTERNATIVES.—Following
25 participation under paragraph (1), the lead agency

1 shall determine the range of alternatives for consid-
2 eration in any document which the lead agency is re-
3 sponsible for preparing for the project, subject to the
4 following limitations:

5 “(A) NO EVALUATION OF CERTAIN ALTER-
6 NATIVES.—No Federal agency shall evaluate
7 any alternative that was identified but not car-
8 ried forward for detailed evaluation in an envi-
9 ronmental document or evaluated and not se-
10 lected in any environmental document prepared
11 under NEPA for the same project.

12 “(B) ONLY FEASIBLE ALTERNATIVES
13 EVALUATED.—Where a project is being con-
14 structed, managed, funded, or undertaken by a
15 project sponsor that is not a Federal agency,
16 Federal agencies shall only be required to evalu-
17 ate alternatives that the project sponsor could
18 feasibly undertake, consistent with the purpose
19 of and the need for the project, including alter-
20 natives that can be undertaken by the project
21 sponsor and that are technically and economi-
22 cally feasible.

23 “(3) METHODOLOGIES.—

24 “(A) IN GENERAL.—The lead agency shall
25 determine, in collaboration with cooperating

1 agencies at appropriate times during the envi-
2 ronmental review, the methodologies to be used
3 and the level of detail required in the analysis
4 of each alternative for a project. The lead agen-
5 cy shall include in the environmental document
6 a description of the methodologies used and
7 how the methodologies were selected.

8 “(B) NO EVALUATION OF INAPPROPRIATE
9 ALTERNATIVES.—When a lead agency deter-
10 mines that an alternative does not meet the
11 purpose and need for a project, that alternative
12 is not required to be evaluated in detail in an
13 environmental document.

14 “(4) PREFERRED ALTERNATIVE.—At the dis-
15 cretion of the lead agency, the preferred alternative
16 for a project, after being identified, may be devel-
17 oped to a higher level of detail than other alter-
18 natives in order to facilitate the development of miti-
19 gation measures or concurrent compliance with other
20 applicable laws if the lead agency determines that
21 the development of such higher level of detail will
22 not prevent the lead agency from making an impar-
23 tial decision as to whether to accept another alter-
24 native which is being considered in the environ-
25 mental review.

1 “(5) EMPLOYMENT ANALYSIS.—The evaluation
2 of each alternative in an environmental impact state-
3 ment or an environmental assessment shall identify
4 the potential effects of the alternative on employ-
5 ment, including potential short-term and long-term
6 employment increases and reductions and shifts in
7 employment.

8 “(h) COORDINATION AND SCHEDULING.—

9 “(1) COORDINATION PLAN.—

10 “(A) IN GENERAL.—The lead agency shall
11 establish and implement a plan for coordinating
12 public and agency participation in and comment
13 on the environmental review for a project or
14 category of projects to facilitate the expeditious
15 resolution of the environmental review.

16 “(B) SCHEDULE.—

17 “(i) IN GENERAL.—The lead agency
18 shall establish as part of the coordination
19 plan for a project, after consultation with
20 each participating agency and, where appli-
21 cable, the project sponsor, a schedule for
22 completion of the environmental review.
23 The schedule shall include deadlines, con-
24 sistent with subsection (i), for decisions
25 under any other Federal laws (including

1 the issuance or denial of a permit or li-
2 cense) relating to the project that is cov-
3 ered by the schedule.

4 “(ii) FACTORS FOR CONSIDER-
5 ATION.—In establishing the schedule, the
6 lead agency shall consider factors such
7 as—

8 “(I) the responsibilities of par-
9 ticipating agencies under applicable
10 laws;

11 “(II) resources available to the
12 participating agencies;

13 “(III) overall size and complexity
14 of the project;

15 “(IV) overall schedule for and
16 cost of the project;

17 “(V) the sensitivity of the natural
18 and historic resources that could be
19 affected by the project; and

20 “(VI) the extent to which similar
21 projects in geographic proximity were
22 recently subject to environmental re-
23 view or similar State procedures.

24 “(iii) COMPLIANCE WITH THE SCHED-
25 ULE.—

1 “(I) All participating agencies
2 shall comply with the time periods es-
3 tablished in the schedule or with any
4 modified time periods, where the lead
5 agency modifies the schedule pursuant
6 to subparagraph (D).

7 “(II) The lead agency shall dis-
8 regard and shall not respond to or in-
9 clude in any document prepared under
10 NEPA, any comment or information
11 submitted or any finding made by a
12 participating agency that is outside of
13 the time period established in the
14 schedule or modification pursuant to
15 subparagraph (D) for that agency’s
16 comment, submission or finding.

17 “(III) If a participating agency
18 fails to object in writing to a lead
19 agency decision, finding or request for
20 concurrence within the time period es-
21 tablished under law or by the lead
22 agency, the agency shall be deemed to
23 have concurred in the decision, finding
24 or request.

1 “(C) CONSISTENCY WITH OTHER TIME PE-
2 RIODS.—A schedule under subparagraph (B)
3 shall be consistent with any other relevant time
4 periods established under Federal law.

5 “(D) MODIFICATION.—The lead agency
6 may—

7 “(i) lengthen a schedule established
8 under subparagraph (B) for good cause;
9 and

10 “(ii) shorten a schedule only with the
11 concurrence of the cooperating agencies.

12 “(E) DISSEMINATION.—A copy of a sched-
13 ule under subparagraph (B), and of any modi-
14 fications to the schedule, shall be—

15 “(i) provided within 15 days of com-
16 pletion or modification of such schedule to
17 all participating agencies and to the
18 project sponsor; and

19 “(ii) made available to the public.

20 “(F) ROLES AND RESPONSIBILITY OF
21 LEAD AGENCY.—With respect to the environ-
22 mental review for any project, the lead agency
23 shall have authority and responsibility to take
24 such actions as are necessary and proper, with-
25 in the authority of the lead agency, to facilitate

1 the expeditious resolution of the environmental
2 review for the project.

3 “(i) DEADLINES.—The following deadlines shall
4 apply to any project subject to review under NEPA and
5 any decision under any Federal law relating to such
6 project (including the issuance or denial of a permit or
7 license or any required finding):

8 “(1) ENVIRONMENTAL REVIEW DEADLINES.—
9 The lead agency shall complete the environmental
10 review within the following deadlines:

11 “(A) ENVIRONMENTAL IMPACT STATE-
12 MENT PROJECTS.—For projects requiring prep-
13 aration of an environmental impact statement—

14 “(i) the lead agency shall issue an en-
15 vironmental impact statement within 2
16 years after the earlier of the date the lead
17 agency receives the project initiation re-
18 quest or a Notice of Intent to Prepare an
19 Environmental Impact Statement is pub-
20 lished in the Federal Register; and

21 “(ii) in circumstances where the lead
22 agency has prepared an environmental as-
23 sessment and determined that an environ-
24 mental impact statement will be required,
25 the lead agency shall issue the environ-

1 mental impact statement within 2 years
2 after the date of publication of the Notice
3 of Intent to Prepare an Environmental Im-
4 pact Statement in the Federal Register.

5 “(B) ENVIRONMENTAL ASSESSMENT
6 PROJECTS.—For projects requiring preparation
7 of an environmental assessment, the lead agen-
8 cy shall issue a finding of no significant impact
9 or publish a Notice of Intent to Prepare an En-
10 vironmental Impact Statement in the Federal
11 Register within 1 year after the earlier of the
12 date the lead agency receives the project initi-
13 ation request, makes a decision to prepare an
14 environmental assessment, or sends out partici-
15 pating agency invitations.

16 “(2) EXTENSIONS.—

17 “(A) REQUIREMENTS.—The environmental
18 review deadlines may be extended only if—

19 “(i) a different deadline is established
20 by agreement of the lead agency, the
21 project sponsor, and all participating agen-
22 cies; or

23 “(ii) the deadline is extended by the
24 lead agency for good cause.

1 “(B) LIMITATION.—The environmental re-
2 view shall not be extended by more than 1 year
3 for a project requiring preparation of an envi-
4 ronmental impact statement or by more than
5 180 days for a project requiring preparation of
6 an environmental assessment.

7 “(3) ENVIRONMENTAL REVIEW COMMENTS.—

8 “(A) COMMENTS ON DRAFT ENVIRON-
9 MENTAL IMPACT STATEMENT.—For comments
10 by agencies and the public on a draft environ-
11 mental impact statement, the lead agency shall
12 establish a comment period of not more than 60
13 days after publication in the Federal Register
14 of notice of the date of public availability of
15 such document, unless—

16 “(i) a different deadline is established
17 by agreement of the lead agency, the
18 project sponsor, and all participating agen-
19 cies; or

20 “(ii) the deadline is extended by the
21 lead agency for good cause.

22 “(B) OTHER COMMENTS.—For all other
23 comment periods for agency or public comments
24 in the environmental review process, the lead
25 agency shall establish a comment period of no

1 more than 30 days from availability of the ma-
2 terials on which comment is requested, unless—

3 “(i) a different deadline is established
4 by agreement of the lead agency, the
5 project sponsor, and all participating agen-
6 cies; or

7 “(ii) the deadline is extended by the
8 lead agency for good cause.

9 “(4) DEADLINES FOR DECISIONS UNDER
10 OTHER LAWS.—Notwithstanding any other provision
11 of law, in any case in which a decision under any
12 other Federal law relating to the undertaking of a
13 project being reviewed under NEPA (including the
14 issuance or denial of a permit or license) is required
15 to be made, the following deadlines shall apply:

16 “(A) DECISIONS PRIOR TO RECORD OF DE-
17 CISION OR FINDING OF NO SIGNIFICANT IM-
18 PACT.—If a Federal agency is required to ap-
19 prove, or otherwise to act upon, a permit, li-
20 cense, or other similar application for approval
21 related to a project prior to the record of deci-
22 sion or finding of no significant impact, such
23 Federal agency shall approve or otherwise act
24 not later than the end of a 90-day period begin-
25 ning—

1 “(i) after all other relevant agency re-
2 view related to the project is complete; and

3 “(ii) after the lead agency publishes a
4 notice of the availability of the final envi-
5 ronmental impact statement or issuance of
6 other final environmental documents, or no
7 later than such other date that is otherwise
8 required by law, whichever event occurs
9 first.

10 “(B) OTHER DECISIONS.—With regard to
11 any approval or other action related to a project
12 by a Federal agency that is not subject to sub-
13 paragraph (A), each Federal agency shall ap-
14 prove or otherwise act not later than the end of
15 a period of 180 days beginning—

16 “(i) after all other relevant agency re-
17 view related to the project is complete; and

18 “(ii) after the lead agency issues the
19 record of decision or finding of no signifi-
20 cant impact, unless a different deadline is
21 established by agreement of the Federal
22 agency, lead agency, and the project spon-
23 sor, where applicable, or the deadline is ex-
24 tended by the Federal agency for good
25 cause, provided that such extension shall

1 not extend beyond a period that is 1 year
2 after the lead agency issues the record of
3 decision or finding of no significant im-
4 pact.

5 “(C) FAILURE TO ACT.—In the event that
6 any Federal agency fails to approve, or other-
7 wise to act upon, a permit, license, or other
8 similar application for approval related to a
9 project within the applicable deadline described
10 in subparagraph (A) or (B), the permit, license,
11 or other similar application shall be deemed ap-
12 proved by such agency and the agency shall
13 take action in accordance with such approval
14 within 30 days of the applicable deadline de-
15 scribed in subparagraph (A) or (B).

16 “(D) FINAL AGENCY ACTION.—Any ap-
17 proval under subparagraph (C) is deemed to be
18 final agency action, and may not be reversed by
19 any agency. In any action under chapter 7 seek-
20 ing review of such a final agency action, the
21 court may not set aside such agency action by
22 reason of that agency action having occurred
23 under this paragraph.

24 “(j) ISSUE IDENTIFICATION AND RESOLUTION.—

1 “(1) COOPERATION.—The lead agency and the
2 participating agencies shall work cooperatively in ac-
3 cordance with this section to identify and resolve
4 issues that could delay completion of the environ-
5 mental review or could result in denial of any ap-
6 provals required for the project under applicable
7 laws.

8 “(2) LEAD AGENCY RESPONSIBILITIES.—The
9 lead agency shall make information available to the
10 participating agencies as early as practicable in the
11 environmental review regarding the environmental,
12 historic, and socioeconomic resources located within
13 the project area and the general locations of the al-
14 ternatives under consideration. Such information
15 may be based on existing data sources, including ge-
16 ographic information systems mapping.

17 “(3) PARTICIPATING AGENCY RESPONSIBIL-
18 ITIES.—Based on information received from the lead
19 agency, participating agencies shall identify, as early
20 as practicable, any issues of concern regarding the
21 project’s potential environmental, historic, or socio-
22 economic impacts. In this paragraph, issues of con-
23 cern include any issues that could substantially delay
24 or prevent an agency from granting a permit or
25 other approval that is needed for the project.

1 “(4) ISSUE RESOLUTION.—

2 “(A) MEETING OF PARTICIPATING AGEN-
3 CIES.—At any time upon request of a project
4 sponsor, the lead agency shall promptly convene
5 a meeting with the relevant participating agen-
6 cies and the project sponsor, to resolve issues
7 that could delay completion of the environ-
8 mental review or could result in denial of any
9 approvals required for the project under appli-
10 cable laws.

11 “(B) NOTICE THAT RESOLUTION CANNOT
12 BE ACHIEVED.—If a resolution cannot be
13 achieved within 30 days following such a meet-
14 ing and a determination by the lead agency that
15 all information necessary to resolve the issue
16 has been obtained, the lead agency shall notify
17 the heads of all participating agencies, the
18 project sponsor, and the Council on Environ-
19 mental Quality for further proceedings in ac-
20 cordance with section 204 of NEPA, and shall
21 publish such notification in the Federal Reg-
22 ister.

23 “(k) REPORT TO CONGRESS.—The head of each Fed-
24 eral agency shall report annually to Congress—

1 “(1) the projects for which the agency initiated
2 preparation of an environmental impact statement or
3 environmental assessment;

4 “(2) the projects for which the agency issued a
5 record of decision or finding of no significant impact
6 and the length of time it took the agency to com-
7 plete the environmental review for each such project;

8 “(3) the filing of any lawsuits against the agen-
9 cy seeking judicial review of a permit, license, or ap-
10 proval issued by the agency for an action subject to
11 NEPA, including the date the complaint was filed,
12 the court in which the complaint was filed, and a
13 summary of the claims for which judicial review was
14 sought; and

15 “(4) the resolution of any lawsuits against the
16 agency that sought judicial review of a permit, li-
17 cense, or approval issued by the agency for an action
18 subject to NEPA.

19 “(1) LIMITATIONS ON CLAIMS.—

20 “(1) IN GENERAL.—Notwithstanding any other
21 provision of law, a claim arising under Federal law
22 seeking judicial review of a permit, license, or ap-
23 proval issued by a Federal agency for an action sub-
24 ject to NEPA shall be barred unless—

1 “(A) in the case of a claim pertaining to
2 a project for which an environmental review
3 was conducted and an opportunity for comment
4 was provided, the claim is filed by a party that
5 submitted a comment during the environmental
6 review on the issue on which the party seeks ju-
7 dicial review, and such comment was suffi-
8 ciently detailed to put the lead agency on notice
9 of the issue upon which the party seeks judicial
10 review; and

11 “(B) filed within 180 days after publica-
12 tion of a notice in the Federal Register an-
13 nouncing that the permit, license, or approval is
14 final pursuant to the law under which the agen-
15 cy action is taken, unless a shorter time is spec-
16 ified in the Federal law pursuant to which judi-
17 cial review is allowed.

18 “(2) NEW INFORMATION.—The preparation of
19 a supplemental environmental impact statement,
20 when required, is deemed a separate final agency ac-
21 tion and the deadline for filing a claim for judicial
22 review of such action shall be 180 days after the
23 date of publication of a notice in the Federal Reg-
24 ister announcing the record of decision for such ac-
25 tion. Any claim challenging agency action on the

1 basis of information in a supplemental environ-
 2 mental impact statement shall be limited to chal-
 3 lenges on the basis of that information.

4 “(3) RULE OF CONSTRUCTION.—Nothing in
 5 this subsection shall be construed to create a right
 6 to judicial review or place any limit on filing a claim
 7 that a person has violated the terms of a permit, li-
 8 cense, or approval.

9 “(m) CATEGORIES OF PROJECTS.—The authorities
 10 granted under this subchapter may be exercised for an in-
 11 dividual project or a category of projects.

12 “(n) EFFECTIVE DATE.—The requirements of this
 13 subchapter shall apply only to environmental reviews and
 14 environmental decisionmaking processes initiated after the
 15 date of enactment of this subchapter.

16 “(o) APPLICABILITY.—Except as provided in sub-
 17 section (p), this subchapter applies, according to the provi-
 18 sions thereof, to all projects for which a Federal agency
 19 is required to undertake an environmental review or make
 20 a decision under an environmental law for a project for
 21 which a Federal agency is undertaking an environmental
 22 review.

23 “(p) SAVINGS CLAUSE.—Nothing in this section shall
 24 be construed to supersede, amend, or modify sections 134,
 25 135, 139, 325, 326, and 327 of title 23, United States

1 Code, sections 5303 and 5304 of title 49, United States
 2 Code, or subtitle C of title I of division A of the Moving
 3 Ahead for Progress in the 21st Century Act and the
 4 amendments made by such subtitle (Public Law 112–
 5 141).”.

6 (b) TECHNICAL AMENDMENT.—The table of sections
 7 for chapter 5 of title 5, United States Code, is amended
 8 by inserting after the item relating to subchapter II the
 9 following:

“SUBCHAPTER IIA—INTERAGENCY COORDINATION REGARDING PERMITTING
 “560. Coordination of agency administrative operations for efficient decision-
 making.”.

10 (c) REGULATIONS.—

11 (1) COUNCIL ON ENVIRONMENTAL QUALITY.—

12 Not later than 180 days after the date of enactment
 13 of this title, the Council on Environmental Quality
 14 shall amend the regulations contained in part 1500
 15 of title 40, Code of Federal Regulations, to imple-
 16 ment the provisions of this title and the amendments
 17 made by this title, and shall by rule designate States
 18 with laws and procedures that satisfy the criteria
 19 under section 560(d)(2)(A) of title 5, United States
 20 Code.

21 (2) FEDERAL AGENCIES.—Not later than 120

22 days after the date that the Council on Environ-
 23 mental Quality amends the regulations contained in

1 part 1500 of title 40, Code of Federal Regulations,
2 to implement the provisions of this title and the
3 amendments made by this title, each Federal agency
4 with regulations implementing the National Environ-
5 mental Policy Act of 1969 (42 U.S.C. 4321 et seq.)
6 shall amend such regulations to implement the pro-
7 visions of this subchapter.

○

Mr. COHEN. War Eagle.
 Thank you, Mr. Chairman.
 I am excited. Not really.

The RAPID Act, otherwise known as the Responsibly and Professional Invigorating Development Act of 2013, creates a new subchapter of the APA to prescribe how environmental reviews required by NEPA, the National Environmental Policy Act, should be conducted for Federal construction projects. I do have sympathy that we want to get projects like this completed quickly, but I do not want to bypass safety concerns. The bill imposes deadlines for agency permit approvals, once the NEPA review process is complete, and would deem approved any application for a permit when an agency does not meet those deadlines.

President Nixon signed NEPA into law, that great liberal, on January 1, 1970, which passed the Congress with bipartisan support. Among other things, NEPA requires that for proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, Federal agencies must prepare a detailed environmental review. NEPA also created the Council on Environmental Quality which issued regulations and guidance implementing NEPA. NEPA's purpose is to provide a framework for wide-ranging input from all affected interests when a Federal agency conducts an environmental review of a proposed project.

I certainly appreciate Mr. Marino, my colleague, who reached out to me on the floor whether changes could be made to the RAPID Act which could earn my support and asked for my support on the floor. I appreciated that, and I immediately went to staff and sought out the possibly that I could do so. And I do hope we can work together on future legislation.

But as this specific act, I continue to have concerns about the fundamental structure of the bill based on our previous consideration of this bill in the last Congress. And I hate to see the record of Richard Nixon, which has been tarnished by himself over the years, tarnished any more by this Congress.

As an initial matter, it is unclear to me why all of the changes to our codifications of NEPA practice contemplated in the RAPID Act belong in the APA. If the bill's proponents would like to amend or add to NEPA's environmental requirements, go ahead and amend NEPA. I am very wary of using the APA as a back door way to amend other statutes or substantive law, particularly those over which this Committee seems to lack jurisdiction or substantive expertise, not that we do not have expertise on other subjects, including the SEC, not to be confused with the Securities and Exchange Commission. But we do not with NEPA.

As I said earlier this week and have said many times before, the APA is our administrative constitution. Like the actual Constitution I would be very concerned about changing it, only in most important times. Using the APA to amend other statutes or substantive law simply by adding subchapters is not the purpose or function of the APA and we ought to guard against this temptation.

Another overreaching concern that I have is the RAPID Act may be aimed at the wrong target. It is my understanding the RAPID Act's purpose is to reduce delays in permitting or project approval purportedly caused by the environmental review process. As we

learned in testimony from Dinah Bear who served for 24 years under Republican and Democratic administrations as General Counsel for the White House Council on Environmental Quality, which oversees NEPA's implementation, most of the delays in the process are not the result of NEPA. Specifically Ms. Bear testified the principal causes of unjustified delay in implementing the NEPA review process are inadequate agency resources, inadequate training, inadequate leadership in implementing conflict dispute resolution mechanisms, and lack of coordination between Federal agencies and agencies at the county, tribal, and State levels, including and particularly coordinated single environmental review processes in cases where governmental agencies at other levels have environmental review procedures. Causes of justified delay include the complexity of the proposed projects and associated impacts of them, changes in the proposed project, the extent and nature of public controversy, changes in budget and policy direction, including directional oversight and new information.

To the extent that RAPID Act's proponents would like to address unjustified causes of delay, their attention might be better focused on addressing inadequate agency resources which, I am sure, are being cut with the sequester, and other sources of such delay that Ms. Bear outlined.

And to the extent that any delay in the environmental review is justified, it would be inappropriate to short-circuit the existing NEPA process.

Another broad concern with the bill is that it would establish a separate environmental review process for Federal construction projects. Here it is important to note that NEPA applies to a broad range of Federal projects, not just construction. For instance, NEPA can apply to hunting permits, land management plans, hunting permits, guns—it might affect guns—land management plans, military base realignment and closure activities, and trout ESUs. The RAPID Act, however, would only apply to a subset of the Federal projects, namely construction activities, potentially adding further confusion as to the fact that there is no definition of construction activities in the bill. This could mean two different environmental review processes would apply in the same project.

For example, the construction of a new nuclear reactor could be a construction activity in the building phase, but may not be with respect to the transportation of new or spent nuclear fuel or any licensing required to operate a new reactor. It is quite possible that two different review processes could apply on the same project as a result.

These are some of the concerns, and there are many about this bill that Ms. Bear raised last year and that Mr. Slesinger will discuss in greater detail today.

In raising criticisms of the RAPID Act, I do not mean to suggest we cannot seek common ground in some limited ways to make the rulemaking process better for everyone. That is what we should be doing in this Committee, in this Congress, and in this world. But we do not seem to be doing that.

As with many of the other regulatory bills we have considered so far, this bill makes a lot of sweeping changes to current law, in this case substantive changes to a statute over which we are not the

Committee of jurisdiction, with which I cannot be comfortable. And therefore, I cannot support the bill.

I thank Mr. Marino very much for his concept, his reaching out to me, and hope that we could find and can find—and with the distinguished Chairman, who went to both Alabama and Auburn, we can find common ground, and I am sure we will.

And I thank our witnesses. I look forward to their testimony.

And further deponent sayeth not.

I yield back the remainder of my time.

Mr. BACHUS. Thank you very much. We appreciate those conciliatory remarks, Mr. Cohen.

And with that, we will recognize the sponsor of the legislation, Mr. Marino, for his opening statement.

Mr. MARINO. Thank you, Chairman.

And like President Nixon, another great liberal, my good friend, Mr. Cohen, who I know down somewhere there is some conservatism—I have traveled with him and I have sensed that—I am sure that we will be able to reach an agreement on this issue.

Let me preface by saying I live out in the country in rural Pennsylvania. I am on about 10 acres. I get my water from a well. I enjoy seeing the bear and the deer walk through my front yard every day. I like going outside and breathing the fresh air and making sure that my children and my land and my constituents are protected. So there is no one, I don't think, who has any greater passion for making sure that we have clean air, clean water, and that our children are protected.

But with that, the American historical record has always been, "The worse the recession, the stronger the recovery." However, although the National Bureau of Economic Research states the recession ended 4 years ago, I think we can agree the recovery has been anything but strong. Besides losing paychecks, millions of Americans have lost the dignity and satisfaction that comes from earning a living and supporting a family. No government benefit can compensate a person for that.

Americans are ready to work and employers are eager to create jobs if government could just get out of the way. As we will hear from the witnesses today, the job opportunities are here on U.S. soil.

One of our witnesses today describes the U.S. Chamber's study, Project No Project, which looked at the potential economic impact of permitting challenges faced by U.S. companies attempting to propose new energy projects. For example, Penn-Mar Ethanol attempted to construct an ethanol producing plant in Conoy Township, Pennsylvania. Neighboring Hellam Township sent a letter to the Conoy Township board of supervisors objecting to the ethanol plant. Hellam Township's objections included environmental risk to the surrounding area and a "risk of causing the beautiful area surrounding the Susquehanna River to become an undesirable sight." Is that what we mean when we talk about negative environmental impact? An obstructed scenic view?

Certainly job creators cannot be effective in creating jobs under such an over-expansive, extreme regime.

After hearing about the numerous projects currently awaiting approval in the testimony today, many of us might be asking our-

selves “if the workers are here and the jobs are here, then what is keeping American workers idle.”

Well, I will tell you. It is our outdated, burdensome, convoluted Federal permitting process that has become a hotbed for the environmental extremists looking to hold up infrastructure building and growth that our country so desperately needs.

The National Environmental Policy Act of 1969 serves worthy goals which should be preserved. Federal agencies should have an awareness of how their actions affect the environment, and this decision-making process should be transparent to the public. It seems the Administration, the President’s Council on Jobs and Competitiveness, and legislation adopted by our strong bipartisan majority in our 109th and 112th Congresses all recognize that an overly burdensome and lengthy environmental review and permitting process undermines economic growth.

My bill, the RAPID Act of 2013, aims to restore the balance between thorough analysis and timely decision-making in the Federal permitting process. It does not seek to force agencies to approve more or fewer permit applications. It simply says be transparent. Put one agency in charge. Follow a rational—a rational—process and approve or deny the project in a reasonable amount of time. Then get out of the way.

Job creators and workers alike deserve to know that a fair decision will be made by a date certain. When a project gets stuck in limbo, companies spend their resources on lawyers instead of using their budget to hire new employees.

The RAPID Act is modeled on existing National Environmental Policy Act, NEPA, regulations and guidance, including guidance from this Administration issued to the agency heads, as well as recommendations from the President’s own Job Council and regulatory reforms adopted with broad bipartisan support in the 109th and 112th bodies of Congress. Americans are ready to get back to work. The RAPID Act of 2013 will remove the red tape and allow job creators to take projects off the drawing board and on to the work site.

In closing, I want to thank my cosponsors, Chairman Bachus, Mr. Coble, Mr. Smith, Mr. Franks, and Mr. Amodei, for their support. Thanks especially to Mr. Bachus for calling this hearing and giving us the opportunity to bring this issue to light.

I would also like to thank our witnesses for attending and sharing their valuable expertise with us. I look forward to a lively debate.

And I reserve the balance of my time. Thank you.

Mr. BACHUS. Thank you, Mr. Marino.

At this time, I would ask unanimous consent to introduce for the record the statements of both the Chairman of the full Committee and the Ranking Member, Congressman Goodlatte and Congressman Conyers, into the record.

[The prepared statement of Mr. Goodlatte follows:]

Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary

Over 4 years into nominal recovery, America's economy remains far too weak, and America's workers have far too few jobs.

The June jobs report showed an increase of 240,000 in the number of discouraged workers—those who have simply quit looking for a job out of frustration or despair. The number of people working part-time—but who really want full-time work—passed 8.2 million. That represents a jump of 322,000 in just one month.

Worst of all, the truest measure of unemployment—the rate that includes both discouraged workers and those who cannot find a full-time job—continues to exceed 20 million Americans. And that rate rose from 13.8% back to 14.3% in June.

In the wake of this bad news, I cannot thank Mr. Marino enough for reintroducing the RAPID Act. This legislation represents one of the most important things Congress can do to stimulate the job creation that America's workers desperately need.

The federal government's outdated and overly burdensome environmental review process keeps jobs and workers waiting for approval from Washington's government agencies for far too long.

A recent study by the U.S. Chamber of Commerce identified 351 proposed energy projects that, if approved, could generate up to two million jobs annually.

Yet these projects and others like them are held up by an environmental review process that takes years, sometimes more than a decade, to reach a conclusion. The National Environmental Policy Act (NEPA) of 1969, under which this process takes place, serves important goals, which should be preserved. But the NEPA process today does not resemble what its authors envisioned.

Because there are no mandatory deadlines for NEPA review, investment capital is tied up indefinitely or until it finally goes away, while the bureaucratic review process grinds on. A 2008 study found that federal agencies take nearly 3½ years on average to complete an environmental impact statement.

Incredibly, in the midst of the Nation's historic economic difficulties, that length of time is *increasing*.

In addition, agencies can deny permit applications based on “new information” not to be found in the environmental study documents—and perhaps provided by a special interest group that opposes the project altogether.

Making matters worse, after bureaucratic review is finished, a whole new cycle of frustration begins. That is the cycle of litigation that sprawls out under the 6-year statute of limitations applicable to permit challenges. The fear of a lawsuit filed up to 6 years after a permit is granted, alleging that some portion of environmental review was defective, further discourages projects from moving forward.

The Empire State Building, the Hoover Dam, the Pentagon, and even the New Jersey Turnpike were built in less than 6 years. Surely litigants can prepare and file lawsuits in less time as well.

Navigating this endless review-and-litigation process can cost job creators millions of dollars when they need to hire consultants and lawyers. But the cost to the economy is exponentially greater.

The key is finding the right balance between economic progress and the proper level of analysis. The RAPID Act strikes this balance. It does not force agencies to approve or deny any projects. It simply ensures that the process agencies use to make permit decisions—and the timeline for subsequent litigation—are transparent, logical and efficient.

To do that, the RAPID Act draws upon established definitions and concepts from existing NEPA regulations. It also draws on common-sense suggestions from across the political spectrum—including from the President's Jobs Council and the Administration's Council on Environmental Quality.

In many respects, the bill is modeled on the permit streamlining sections of Congress' SAFETEA-LU and MAP-21 transportation legislation, which commanded bipartisan support. A study by the Federal Highway Administration found that this legislation has cut the time for completing an environmental impact statement nearly in half.

I urge my colleagues to support the RAPID Act and cut down the time it takes America's workers to see a real Jobs Recovery.

[The prepared statement of Mr. Conyers follows:]

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

The title of bill that is the subject of today's hearing, namely—the “Responsibly and Professionally Invigorating Development Act of 2013”—is unfortunately very misleading.

Rather than effectuating *real* reforms to the process by which federal agencies undertake environmental impact reviews as required by the National Environmental Policy Act, or NEPA, this legislation will actually result in making this process *less* responsible, *less* professional, and *less* accountable.

Worse yet, this measure could jeopardize public health and safety by prioritizing speed over meaningful analysis.

To begin with, the bill—under the guise of streamlining the approval process—forecloses potentially critical input from federal, state and local agencies and other interested parties for construction projects that are federally-funded or that require federal approval.

As a result, this measure could allow projects to proceed that put public health and safety at risk.

For example, as Mr. Slesinger aptly explains in his prepared testimony for today's hearing, this bill could effectively prevent the Nuclear Regulatory Commission from exercising its licensing authority pertaining to nuclear power reactors, waste management sites, and nuclear waste disposal facilities.

This measure could even allow such projects to be approved *before* the safety review is completed.

This failing of the bill, along with many others, explains why the Administration and the President's Council on Environmental Quality, along with 25 respected environmental groups, including the Audubon Society, League of Conservation Voters, Natural Resources Defense Council, Sierra Club, and The Wilderness Society, vigorously opposed this bill's predecessor in the last Congress.

In issuing its veto threat regarding that prior measure, the Administration noted, for example, that the bill “would create excessively complex permitting processes that would hamper economic growth.”

Another concern that I have with this bill—like other measures that we have considered—is that it is a solution in search of a problem.

And, that is just not my opinion. The nonpartisan Congressional Research Service issued a report last year stating that the primary source of approval delays for construction projects “are more often tied to local/state and project-specific factors, primarily local/state agency priorities, project funding levels, local opposition to a project, project complexity, or late changes in project scope.”

CRS further notes that project delays based on environmental requirements stem not from NEPA, but from “laws other than NEPA.”

So I have to ask, why do we need a bill such as the so-called RAPID Act that will undoubtedly make the process less clear and less protective of public health and safety?

My final major concern with this bill is that it is a thinly disguised effort to shift power *away* from governmental agencies that are accountable to the public and to instead give greater control to politically unaccountable industry so that it can run roughshod over everyone else.

This general tack is highlighted by a number of the bill's provisions.

For example, the bill limits the opportunity for public participation and imposes deadlines that may be unrealistic under certain circumstances.

In addition, the bill creates a separate, but only partly parallel environmental review process for construction projects that will only cause confusion, delay, and litigation.

As I noted at the outset, the changes to the NEPA review process contemplated by this measure apply *only* to proposed federal construction projects.

NEPA, however, applies to a broad panoply of federal actions, including fishing, hunting, and grazing permits, land management plans, Base Realignment and Closure activities, and treaties.

In contrast, the bill applies only to a subset of federal activities. In fact, even this subset is ill-defined under the measure as it fails to define what actually would constitute a construction project.

This could lead to two different environmental review processes for the same project. For instance, the bill's requirements would apply to the construction of a nuclear reactor, but not to its decommissioning or to the transportation and storage of its spent fuel.

Rather than streamlining the NEPA process, this bill only adds complication, confusion, and potential litigation to the process.

But, more importantly, this bill is yet another effort by my friends on the other side of the aisle to undermine regulatory protections.

As with all the other bills, this measure is a thinly disguised effort to hobble the ability of federal agencies to be able to do the work that we in Congress have assigned them to do.

Mr. BACHUS. And with that, we have a very distinguished group of panelists, and I would like to start by introducing them to the Committee.

Bill Kovacs, who is no stranger to our Committee, provides the overall direction, strategy, and management for the Environmental, Technological, and Regulatory Affairs Division of the U.S. Chamber. Since he joined the Chamber in March 1998, he has transformed a small division concentrating on a handful of issues in committee meetings into one of the most significant in the organization. His division initiates and leads national issue campaigns on energy legislation, complex environmental rulemaking, telecommunications reform, emerging technologies, and applying sound science to Federal regulatory processes.

Mr. Kovacs previously served as chief counsel and staff director with the House Subcommittee on Transportation and Commerce.

He earned his J.D. from Ohio State University College of Law and bachelor of science degree from the University of Scranton, magna cum laude.

Welcome, Mr. Kovacs.

Mr. Dennis Duffy, we welcome you. He is the Vice President of Energy Management, Incorporated, a leading developer of traditional renewable energy projects. Prior to joining EMI, Mr. Duffy was a partner of the law firm of Partridge, Snow & Hahn, and he was chairman of the firm's public utilities practice group. Where? Was that in Boston?

Mr. DUFFY. Boston, yes, sir.

Mr. BACHUS. Mr. Duffy served as special counsel to the Rhode Island Energy Facilitates siting board and the Rhode Island Partnership for Science and Technology. He was also a member of the Northeast Roundtable of the NEPA Task Force.

He has been an adjunct professor of law at Boston College Law School since 2010.

He received his B.A. in history from the University of Rhode Island and his J.D. from Columbia University Law School.

Mr. Scott Slesinger is the Legislative Director of the National Resources Defense Council, and we welcome you back to the Committee again. In his capacity, he works with the NRDC staff to develop strategies for advancing environmental legislation.

Prior to joining NRDC, Mr. Slesinger served as Vice President for Governmental Affairs at the Environmental Technology Council, an industry trade association that represents companies that recycle, destroy, or dispose of hazardous waste.

Mr. Slesinger also worked at EPA's Office of Legislative Analysis. Additionally, he served in the offices of Representative Henry Nowak of New York and the late Senator Frank Lautenberg of New Jersey. So I am sure you were saddened by his death, but we lost a great statesman.

He earned his undergraduate and law degrees at the State University of Buffalo. And you did not freeze to death while you were getting those degrees.

Mr. SLESINGER. No. It is getting warmer.

Mr. BACHUS. Is it? [Laughter.]

It is.

Mr. Nick Ivanoff is President and CEO of Ammann & Whitney, an architecture and engineering firm headquartered in New York City. In this capacity, Mr. Ivanoff has technical, marketing, administrative, and financial responsibility for company operations worldwide.

Mr. Ivanoff is currently First Vice Chairman and Executive Committee Member serving on the board of directors and Chairman of the International Affairs Advisory Council for the American Road & Transportation Builders Association, a trade association with more than 5,000 members which advocates strong investment in transportation infrastructure.

Now, I will tell you just an aside. Chairman Bill Shuster gave a speech yesterday morning calling for greater infrastructure spending across the board. And if you travel to countries like China, Singapore, or anywhere, you come back here and you realize that we are behind. You cannot have a leading Nation in the world with a third world infrastructure.

Mr. Ivanoff is a registered professional engineer and professional planner with 39 years of experience. He received his B.S. in civil engineering and M.S. in traffic engineering and transportation planning from the Polytechnic Institute of Brooklyn.

We welcome you.

And with that, Mr. Kovacs, we will proceed from my left to right with your opening statements in 5 or so minutes. We do not stop people exactly on the clock. So if you have got 6 minutes of things you need to say, say them.

TESTIMONY OF WILLIAM K. KOVACS, SENIOR VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY & REGULATORY AFFAIRS, U.S. CHAMBER OF COMMERCE

Mr. KOVACS. Mr. Chairman, Ranking Member Cohen, and Members of the Committee, thank you very much for asking me to testify today on the Responsibly and Professionally Invigorating Development Act of 2013, commonly referred to as RAPID.

The RAPID Act continues a long line of bipartisan efforts by Congress, the President, and a few States to streamline the Nation's permitting process. A few examples include the President's asserted leadership on the role of permit streamlining in his State of the Union Address, his May and June 2013 presidential memoranda on streamlining permits on infrastructure projects, and his March and June executive orders on improving performance of Federal permitting on infrastructure projects.

Congress is not to be left behind. Congress has taken a leadership role in a bipartisan way on the enactment of permit streamlining provisions in the American Recovery and Investment Act, SAFETEA-LU, and MAP-21, and most recently the Senate on WRDA. The Governors of California and Minnesota are also pro-

moting permit streamlining to expedite infrastructure projects and job creation.

The RAPID Act—and this is so important—is modeled after SAFETEA-LU and MAP-21, which addressed the long administrative delays in completing permit reviews for transportation projects. Both were passed by large bipartisan majorities in both houses of Congress and both signed by the President. By adopting the common sense approach that is in these bills, the RAPID Act merely imposes a common sense management process on Federal agencies that will make a huge difference in building projects and creating jobs, and it does this in three ways.

One, it is literally all procedural. It requires a Federal lead agency to coordinate and manage the environmental review process within specified time periods.

Two, it requires concurrent rather than sequential review.

And three, it establishes a 6-month statute of limitations rather than a 6-year one. And this 6-month statute of limitations is literally 4 months longer than the statute of limitations for challenging any other administrative action under the Administrative Procedure Act, and it is the same time limit as in SAFETEA-LU, and MAP-21 is only 5 months.

These very simple procedural changes will help our country create millions of jobs by getting rid of excess administrative delays. It does not go into what the outcome is or what the substance of any of the environmental laws are.

Let me provide a clear illustration of the impact on jobs in the economy. A few years ago, the Chamber undertook a study called Project No Project which identified 351 electric generating and transmission projects around the United States that were seeking permits but could not secure a permit to begin construction. The most surprising aspect of our study was the fact that on renewable projects, there were 140 renewable projects seeking a permit and not being able to get it, and only 111 coal-fired power plants.

And the main finding was that the opponents of these projects—and I think some of this you can address in the bill and some of it you cannot—brought a series of administrative and legal challenges at the local, State, and Federal level against the projects, causing such long delay that usually the project sponsor either lost financing or literally abandoned the project or moved the project to some other locality.

Often many of these same groups that are arguing before this Congress to think globally about renewable fuels and renewable energy are acting locally to stop these projects. And that is what the 140 were all about, stopping them.

The Chamber believes that the approach taken by RAPID will greatly accelerate the administrative permitting process, thereby allowing projects to be built and jobs to be created. The best illustration—and we know that it works—is the study that the Federal Highway Administration did of the SAFETEA-LU requirements in 2010, and they found that just through the use of the SAFETEA-LU process, the time cut for granting a permit dropped in half from 73 months to 37 months.

RAPID is a common sense solution to a broken administrative process. Congress has it in its power to fix it. They fixed it in sev-

eral other ways in a bipartisan fashion. The President has very clearly gotten behind permit streamlining. And so this is one issue where I hope at some point in time we all can work together because I think whether or not the bill stays in exactly the form it is in, the fact is that we have to do something to break the logjam and the time delays.

Thank you very much.

[The prepared statement of Mr. Kovacs follows:]



Statement of the U.S. Chamber of Commerce

ON: HEARING ON THE "RESPONSIBLY AND
PROFESSIONALLY INVIGORATING DEVELOPMENT ACT
OF 2013"

TO: HOUSE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE
ON REGULATORY REFORM, COMMERCIAL AND
ANTITRUST LAW

BY: WILLIAM L. KOVACS,
SENIOR VICE PRESIDENT, ENVIRONMENT, TECHNOLOGY
& REGULATORY AFFAIRS

DATE: JULY 11, 2013

The Chamber's mission is to advance human progress through an economic,
political and social system based on individual freedom,
incentive, initiative, opportunity and responsibility.

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

**BEFORE THE COMMITTEE ON THE JUDICIARY OF THE U.S. HOUSE OF
REPRESENTATIVES, SUBCOMMITTEE ON REGULATORY REFORM,
COMMERICAL AND ANTITRUST LAW**

The “Responsibly and Professionally Invigorating Development Act of 2013”

**Testimony of William L. Kovacs
Senior Vice President, Environment, Technology & Regulatory Affairs
U.S. Chamber of Commerce**

July 11, 2013

Good morning, Chairman Bachus, Ranking Member Cohen, and distinguished Members of the Subcommittee. My name is William L. Kovacs and I am senior vice president for Environment, Technology and Regulatory Affairs at the U.S. Chamber of Commerce. You have asked me to come before the Subcommittee today to discuss the “Responsibly and Professionally Invigorating Development Act of 2013,” or the RAPID Act. One of the most significant problems plaguing our current regulatory process is the Byzantine maze of approvals and legal challenges that must be navigated before a major development project can be permitted. The RAPID Act is designed to address that problem by speeding up the permitting process for job-creating infrastructure projects. On behalf of the Chamber and its members, I thank you for the opportunity to testify here today in support of this legislation.

I. BIPARTISAN SUPPORT FOR PERMIT STREAMLINING

The RAPID Act would be the strong action needed to speed up the permitting process and let important projects to move forward, allowing millions of workers to get back to work. Permit streamlining has traditionally drawn bipartisan support and transcended political parties for decades, but little progress had been achieved until several recent narrow fixes that achieved big results.¹

Democrats, Republicans, the White House, and the business community all agree that we must remove needless red tape that stalls and often kills major development projects:

- President Obama pledged to cut “red tape” and speed up “new oil and gas permits” in his 2013 State of the Union address.

¹ Piet deWitt, Carole A. deWitt, “How Long Does It Take to Prepare an Environmental Impact Statement?” *Environmental Practice* 10 (4), December 2008 (“Concern about streamlining the EIS preparation process transcends political party”). As described later in this testimony, streamlining provisions in SAFETEA-LU and the American Recovery and Reinvestment Act have yielded positive and substantial results.

- Democratic Governor Jerry Brown of California, in his January 24, 2013 State of the State, called upon lawmakers to “rethink and streamline our regulatory procedures” so that they are “based upon more consistent standards that provide greater certainty and cut needless delays.”
- Minnesota Governor Mark Dayton (Democratic-Farmer-Labor Party) has increased his efforts to expedite the permitting process by announcing in January of this year that he had directed the Minnesota Department of Natural Resources and the Minnesota Pollution Control Agency to issue or deny permits within 90 or 150 days (depending on the nature and complexity of the permit), rather than allowing applications to languish indefinitely.
- In February of this year, the Department of Interior announced that it had identified 23 renewable energy projects as priority projects for pushing through the federal permitting process this year and next year.²
- On March 5, 2013, the White House Council on Environmental Quality released new guidelines aimed at making environmental reviews under the National Environmental Policy Act (NEPA) more efficient. According to CEQ, the guidelines will “promote informed federal decisions on projects that impact American communities and help agencies improve efficiency, maximize staff resources and reduce costs.”³ For example, the National History Preservation Act and NEPA have duplicative requirements that agencies must examine how a proposal may affect historic properties. The CEQ guidelines call for combining those requirements in an environmental review.
- The President’s Fiscal Year 2014 Budget, which the White House released on April 10, 2013, seeks to expedite “infrastructure projects by modernizing the Federal permitting process to cut through red tape while creating incentives and better outcomes for communities and the environment” and establish “a new goal of cutting timelines in half for major infrastructure projects in areas such as highways, bridges, railways, ports, waterways, pipelines, and renewable energy.”⁴
- In April 2013, Senator Barbara Boxer (CA) was quoted in April 2013 as saying, “[t]he environmentalists don’t like to have any deadlines set so that they can stall projects forever...I think it’s wrong, and I have many cases in California where absolutely necessary flood control projects have been held up for so long that people are suffering from the adverse impacts of flooding.”⁵ She also added that she did not think that environmentalists’ concerns about potentially rushed permit approvals were

² Available at http://www.blm.gov/wo/st/en/prog/energy/renewable_energy/active_renewable_projects.html.

³ Available at <http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/handbooks>

⁴ Available at <http://www.whitehouse.gov/photos-and-video/video/2013/04/10/president-obama-announces-fiscal-year-2014-budget#transcript>

⁵ April 28, 2013 *Los Angeles Times* article by Richard Simon, “Sen. Boxer finds herself at odds with environmentalists.” (Available at <http://latimes.com/news/nationworld/nation/la-na-boxer-environmentalists-20130429,0,1134896.story>)

“legitimate.”⁶ The Senator made these comments in support of legislation that would impose deadlines for environmental reviews of water projects.

- In May 2013, President Obama signed a Presidential Memorandum aimed at modernizing the Federal infrastructure permitting process by directing all relevant agencies to institute best practices for efficient review and permitting of projects and developing a fast track procedure for infrastructure projects through the expanded use of IT tools like geospatial systems. According to the White House, streamlining the permitting process will mean that the U.S. can “start construction sooner, create jobs earlier, and fix our Nation’s infrastructure faster.”⁷
 - In support of this initiative, the White House announced that, since the President issued a March 2012 Executive Order calling for improved efficiency in the Federal permitting process, agencies have expedited the review and permitting of 50 major projects, 22 of which have completed the Federal permitting and review process.
 - Similarly, the time it takes to permit these projects has been significantly shortened. For example, concurrent reviews on projects like the Southwest Light Rail Transit project in Minneapolis and the Central Valley segment of the California High Speed Rail are expected to cut project timelines by as much as 30%. Also, close collaboration between Federal, State and local governments has reduced the timeline for the Tappan Zee Bridge in New York by 2-3 years.
- On June 7, 2013, President Obama issued a Memorandum calling for improvements in the performance of Federal siting, permitting, and review processes for modernizing and expanding the nation’s electric grid.⁸
- According to a Department of Energy study released in April 2013, residential solar systems are cheaper in cities with streamlined permitting processes. The study states that “all else being equal, streamlining the permitting process could potentially reduce the price of a 4-kW residential PV [photovoltaic] system by \$1,000 or more, on average, and cut development time by about a month.”⁹
- In March 2012, President Obama issued Executive Order 13604, aimed at “Improving Performance of Federal Permitting and Review of Infrastructure Projects.”¹⁰ The Executive Order directs federal agencies to ramp up efforts to improve the federal permitting process by institutionalizing best practices, reducing the amount of time

⁶ *Id.*

⁷ Available at <http://www.whitehouse.gov/the-press-office/2013/05/17/creating-jobs-faster-cutting-timelines-half-major-infrastructure-project>

⁸ Available at <http://www.whitehouse.gov/the-press-office/2013/06/07/presidential-memorandum-transforming-our-nations-electric-grid-through-i>

⁹ Available at <http://emp.lbl.gov/news/impact-city-level-permitting-processes-residential-photovoltaic-installation-prices-and-develop>

¹⁰ Available at <http://www.whitehouse.gov/the-press-office/2012/03/22/executive-order-improving-performance-federal-permitting-and-review-infr>

required to make permitting and review decisions, and improving environmental and community outcomes.¹¹

- In 2011, the President's Council on Jobs and Competitiveness developed—in consultation with the Chamber and a wide range of stakeholders—a set of common-sense initiatives to boost jobs and competitiveness. Chief among these initiatives was a set of ideas to “simplify regulatory review and streamline project approvals to accelerate jobs and growth.”¹² Recommendations included early stakeholder engagement, reduced duplication among local, state and federal agency reviews, and improved litigation management.¹³

II. DEFINING THE PROBLEM

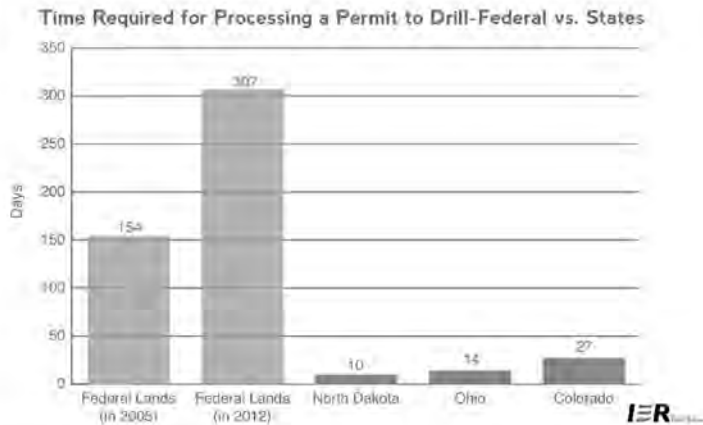
The Hoover Dam was built in five years. The Empire State Building took one year and 45 days. The Pentagon, one of the world's largest office buildings, took less than a year and a half. The New Jersey Turnpike needed only four years from inception to completion. Fast forward to 2013, and the results are much different. Cape Wind needed over a decade to obtain the necessary permits to build an offshore wind farm. After obtaining federal leases in 2005, it took Shell Corporation seven years to obtain oil and gas exploration permits for the Beaufort Sea. And the Port of Savannah, Georgia spent thirteen years reviewing a potential dredging project, with the end of the review process not coming until late last year.

At a February 5, 2013 hearing before the House Subcommittee on Energy and Power, a representative from the Institute for Energy Research testified that it currently takes more than 300 days to process a permit to drill for oil and gas on federal lands onshore. This is in contrast to the time it takes to process a permit for the same drilling activities on private and state lands – less than one month.

¹¹ The Federal Plan for implementing Executive Order 13604 identifies two comprehensive goals: (1) more efficient and effective review of large-scale and complex infrastructure projects, culminating in better projects, improved outcomes for communities, and faster permit decision-making and review timelines; and (2) transparency, predictability, accountability, and continuous improvement of routine infrastructure permitting and reviews. Available at https://permits.performance.gov/sites/all/themes/permits2/files/federal_plan.pdf.

¹² “Interim Report of the President's Council on Jobs and Competitiveness, available at <http://www.jobs-council.com/recommendations/streamline-regulations-that-hurt-job-creation/>.

¹³ *Id.*



This is a systemic problem that is pervading our country across geographic and industry lines. Indeed, the United States ranks 17th in the world in the time it takes to obtain a government green light for development – one of the ten criteria that the International Monetary Fund considers when looking for the “ease of doing business.”

If our great nation is going to begin creating jobs at a faster rate, we must get back in the business of building things. But we need to figure out how to do it without endless permit delays related to our complex regulatory process that allow almost anyone to stall or stop any project.

A. The Project No Project Inventory and its Significance

In 2009, the Chamber unveiled *Project No Project*, an initiative that catalogued the broad range of energy projects that were delayed or halted because of the inability to obtain permits and endless legal challenges by opponents of development. Results of the assessment are compiled onto the *Project No Project* Website (<http://www.projectnoproject.com>). The purpose of the *Project No Project* initiative was to understand the impacts of serious project impediments on our nation. It remains the only attempt to catalogue the wide array of energy projects being challenged nationwide.

Through *Project No Project*, the Chamber identified usable information for 333 distinct projects. These included 22 nuclear projects, 1 nuclear disposal site, 21 transmission projects, 38 gas and platform projects, 111 coal projects and 140 renewable energy projects—notably 89 wind, 4 wave, 10 solar, 7 hydropower, 29 ethanol/biomass and 1 geothermal project. Given that some of the electric transmission projects were multi-state investments and, as such, necessitate approval from more than one state, these investments were apportioned among the states, resulting in 351 state-level projects attributed to forty-nine states:

The results of the inventory were startling. One of the most surprising findings is that it has been just as difficult to build a wind farm in the U.S. as it is to build a coal-fired power plant. In fact, over 40 percent of the challenged projects identified in our study were renewable energy projects. Often, many of the same groups urging us to think globally about renewable energy are acting locally to stop the very same renewable energy projects that could create jobs and reduce greenhouse gas emissions. Activists have blocked more renewable projects than coal-fired power plants by organizing local opposition, changing zoning laws, opposing permits, filing lawsuits, and using other delay mechanisms, thereby effectively bleeding projects dry of their financing.



Full descriptions for each project are available on the *Project No Project* Website.

It quickly became clear from our research that the nation's complex, disorganized process for permitting new facilities and its frequent manipulation by opponents constitute a major impediment to economic development and job creation. Which prompted the next question: what are the economic effects of this problem on the economy and job growth?

According to an economic study that we commissioned, the successful construction of the 351 projects identified in the *Project No Project* inventory could have produced a \$1.1 trillion short-term boost to the economy and created 1.9 million jobs annually during the

projected seven years of construction.¹⁴ Moreover, after these facilities are constructed, they would continue to generate jobs because they operate for years or even decades. According to the study, in aggregate, each year of operation of these projects could generate \$145 billion in economic benefits and involve 791,000 jobs.

B. How Did the Environmental Review Process For Projects Get So Out of Hand?

The mandate to conduct environmental reviews of major projects comes from section 102 of the National Environmental Policy Act of 1969 (NEPA), which requires federal agencies to include a “detailed statement” evaluating the environmental impacts of major federal actions, along with potential alternatives, unavoidable effects, impacts on long-term productivity, and resource commitments for all covered projects.¹⁵ When NEPA was enacted some forty-four years ago, regulatory agencies routinely ignored environmental considerations when they wrote rules or undertook projects. NEPA was designed to address this deficiency and force federal agencies to consider the environmental consequences of their actions. The law itself was therefore a welcome – and necessary – new component of the federal decision-making process.

It is worth remembering, however, that Congress emphatically did **not** intend the consideration of environmental impacts to curtail or significantly delay federal action. NEPA’s “detailed statement” provision (the requirement to prepare an Environmental Impact Statement or EIS) was not included in the version of NEPA initially passed by the House, but was subsequently inserted in conference from the Senate-passed version of the bill.¹⁶ In the conference report, the conferees expressed the clear expectation that the NEPA review process would impose only a minor delay on federal agency action. Specifically, they stated:

The conferees do not intend that the requirements for comment by other agencies should unreasonably delay the processing of Federal proposals and anticipate that the President will promptly prepare and establish by Executive order a list of those agencies which have “jurisdiction by law” or “special expertise” in various environmental matters.

The conferees believe that in most cases the requirement for State and local review may be satisfied by notice of proposed action in the Federal Register and by providing supplementary information upon the request of the State and local agencies. (To prevent undue delay in the processing of Federal proposals, the conferees recommend that the President establish a time limitation for the receipt of comments from Federal, State, and local agencies similar to the 90-day review period presently established for comment upon certain Federal proposals.)¹⁷

¹⁴ The Chamber-commissioned economic study is titled *Progress Denied: The Potential Economic Impact of Permitting Challenges Facing Proposed Energy Projects*, which was produced by Steve Pociask of TeleNomic Research, LLC and Joseph P. Fuhr, Jr., Ph.D., of Widener University. An electronic copy of the study can be accessed at <http://www.projectnoproject.com/progress-denied-a-study-on-the-potential-economic-impact-of-permitting-challenges-facing-proposed-energy-projects/>.

¹⁵ 42 U.S.C. § 4332.

¹⁶ House Report No. 91-765, December 17, 1969.

¹⁷ *Id.* at 8-9 (emphasis added).

It is safe to assume that if the Congress that passed NEPA in 1969 saw how long it takes to perform an EIS today, it may not have voted as overwhelmingly in favor of passage. In December 2008, Piet and Carole A. deWitt performed what appears to be the only true quantitative analysis of the time required to complete an EIS.¹⁸ Through an exhaustive *Federal Register* search, they found that between January 1, 1998 and December 31, 2006, 53 federal executive branch entities made available to the public 2,236 final EIS documents; the time to prepare an EIS during this time ranged from 51 days to 6,708 days (18.4 years).¹⁹ The average time for all federal entities was 3.4 years, but most of the shorter EIS documents occurred in the earlier years of the analysis; EIS completion time increased by 37 days each year.²⁰ The U.S. Forest Service, Federal Highway Administration, and Army Corps of Engineers were responsible for 51 percent of the EISs performed during the deWitt study period.²¹

This sad reality is a long way from the intent of NEPA's framers – specifically, that the new law would chiefly be administered and enforced efficiently by the federal agencies themselves, with substantial oversight from the White House Office of Management and Budget (OMB). CEQ believed in 1981 that federal agencies should be able to complete most EISs in 12 months or less.²² Moreover, the framers also assumed that agencies would be afforded broad discretion in determining how to implement the law, and an agency's NEPA decisions would not be second-guessed by a court. Supporting this key point is the fact that NEPA does not explicitly provide a right of judicial review, and the legislative history of the statute is silent on the right of private action to enforce NEPA. Moreover, in 1970 the judicial standing requirements for third parties who did not participate in an agency action (i.e., neither the project applicant nor the agency) were sufficiently stringent to preclude most environmental group plaintiffs.

For these reasons, few people expected the courts to take the primary role in interpreting and enforcing NEPA. Within ten years, however, several key developments ensured that the courts would become the arbiters of NEPA, and that environmental reviews would become costly, complex and time-consuming undertakings.

- **The courts interpret a right of judicial review of actions under NEPA (1971).** In the first major NEPA case in 1971, *Calvert Cliffs Coordinating Comm. v. AEC*,²³ the U.S. Court of Appeals for the D.C. Circuit found that an agency's compliance with NEPA is reviewable, and that the agency is *not* entitled to assert that it has wide discretion in performing the procedural duties required by NEPA. By 1977, in *Shiffler v. Schlesinger*,²⁴ the Court of Appeals for the Third Circuit found that "it is now clear that NEPA does create a discrete procedural obligation on government agencies to give written consideration of environmental issues in connection with certain major federal actions and a right of action in adversely affected parties to enforce that obligation."

¹⁸ Piet deWitt, Carole A. deWitt, "How Long Does It Take to Prepare an Environmental Impact Statement?" *Environmental Practice* 10 (4), December 2008.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Council on Environmental Quality, "NEPA's Forty Most Asked Questions," 46 Fed. Reg. 55 at 18026-18038 (1981).

²³ 449 F.2d 1109 (D.C. Cir. 1971).

²⁴ 548 F.2d 96 (3d Cir. 1977).

(emphasis added). The Court cited *Aberdeen & Rockfish R.R. v. SCRAP (SCRAP II)*,²⁵ and noted that *SCRAP II* is dispositive of the reviewability of agency compliance with NEPA section 102.

- **The courts find that agencies have very limited discretion in determining how to meet their NEPA obligations (1971).** In *Citizens to Preserve Overton Park v. Volpe*,²⁶ the Supreme Court considered a challenge to the Department of Transportation's decision to route an Interstate highway through a park. The Court noted that "[a] threshold question – whether petitioners are entitled to any judicial review – is easily answered. Section 701 of the Administrative Procedure Act ... provides that the action of 'each authority of the Government of the United States' ... is subject to judicial review except where there is a statutory prohibition on review or where 'agency action is committed to agency discretion by law.'"²⁷ In the wake of the *Overton Park* decision, it was clear that agency actions involving NEPA would be carefully scrutinized by the courts. Indeed, the courts became the most important interpreter of NEPA's requirements and established procedural norms that all agencies were obliged to follow.
- **Third-party environmental groups have standing to sue on NEPA claims (1972).** In *Sierra Club v. Morton*,²⁸ the Supreme Court found that an environmental group had not adequately alleged that it or its members' activities would be affected by a proposed action of the U.S. Forest Service, thereby failing to satisfy the requirements for judicial standing. The Court noted that:

The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members used Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.

The environmental group promptly amended its complaint following the Court's decision, and was able to satisfy the standing requirement. Following this case, environmental group plaintiffs had a relatively simple task establishing standing in NEPA and other environmental cases. Moreover, during the 1970s, the Justice Department generally declined to vigorously contest standing by environmental groups in cases involving NEPA and other statutes.

- **CEQ issues first NEPA regulations (1977).** President Carter signed Executive Order 11,991 in May of 1977, which required the Council on Environmental Quality (CEQ) to issue regulations instructing federal agencies specifically how to comply with NEPA. CEQ issued the regulations in November of 1978.²⁹ (see 40 C.F.R. §§ 1500.1 – 1508.28). Among other things, this rule required agencies to incorporate the review requirements of

²⁵ 422 U.S. 289, 319 (1975).

²⁶ 401 U.S. 402 (1971).

²⁷ *Id.* at 410.

²⁸ 405 U.S. 727 (1972).

²⁹ 43 Fed. Reg. 55,990 (November 28, 1978)

NEPA into each agency's existing regulations. Section 1500.6 requires agencies to interpret the provisions of NEPA as a supplement to the agency's existing authority and as a mandate to view its traditional policies and missions in the light of NEPA's national environmental objectives. In other words, agencies were instructed to give environmental objectives at least equal weight relative to other agency policies and missions. The NEPA rule contained many prescriptive elements (e.g., agencies are required to explore and objectively evaluate all reasonable alternatives, agencies must obtain information about reasonably foreseeable significant adverse impacts, unless the overall cost of obtaining the information is "exorbitant"). In the wake of the prescriptive NEPA rule, federal agencies increasingly erred on the side of over-inclusive environmental reviews, and began the trend of giving environmental objectives greater weight than any other agency policy or mission.

As a result of these significant developments, within fifteen years of NEPA's enactment, environmental groups gained unrestricted access to the courts, along with a statutory presumption that their environmental objectives take precedence over other agency goals, together with powerful financial incentives to bring NEPA lawsuits against the agencies. As national environmental groups gained experience and success with NEPA claims, they began working with local environmental groups and law school legal clinics to leverage their expertise into more and more lawsuits. As a leading NEPA researcher has noted:

The House Committee on Resources' NEPA task forces (US House of Representatives, Committee on Resources, 2006) and the Congressional Research Service (2006) have suggested that the threat of litigation is a major cause for the long EIS preparation process. The task forces and the Congressional Research Service noted that NEPA litigation is not a major component of all federal litigation, but they have implied that the threat of litigation and the potential for adverse judicial decisions can have a much greater effect than the actual number of lawsuits.³⁰

Congress remained largely on the sidelines while the courts assumed the task of interpreting and expanding the scope of NEPA in the 1970s. As the amount of time required for agency approvals of actions began to grow longer and longer due to lawsuits, it became clear that NEPA challenges had become a serious obstacle to all development projects.

The result of NEPA's dramatic expansion is a system so bogged-down by administrative procedure and litigation that it is gridlocked.³¹ Although this result was not intended by Congress when it enacted NEPA, over thirty years, the modest requirements of NEPA became an all-consuming super-mandate that overwhelms large-scale projects. As the U.S. Court of Appeals for the D.C. Circuit recently noted in a somewhat different context, "[t]he law tends to

³⁰ Piet deWitt, Carole A. deWitt, "How Long Does It Take to Prepare an Environmental Impact Statement?" *Environmental Practice* 10 (4), at 172, December 2008.

³¹ The near-certainty that a project's permits will be litigated caused one company, Shell, to actually *file a lawsuit against its own project* so that it didn't have to wait until the last day of the statute of limitations for its opponents to file suit. See <http://www.alaskajournal.com/Alaska-Journal-of-Commerce/AJOC-February-26-2012/Shell-files-pre-emptive-strike-seeks-approval-of-process-on-spill-plan/>.

snowball. A statement becomes a holding, a holding becomes a precedent, a precedent becomes a doctrine, and soon enough we're bowled over at the foot of a mountain, on our backs and covered in snow."³² And when the government actually needs to funnel money quickly into infrastructure to create jobs, the delay built into complying with NEPA can present real problems. That is precisely what happened in the case of the 2009 economic stimulus bill.

C. The Recovery Act and SAFETEA-LU: Congress Streamlines the Process

During debate on the 2009 economic stimulus bill which became the American Recovery and Reinvestment Act ("Recovery Act"), the Chamber called attention to the fact that our nation's flawed permitting process would ensure that no Recovery Act project would ever truly be "shovel-ready." Senators Barrasso and Boxer worked together to secure an amendment to the bill requiring that the NEPA process be implemented "on an expeditious basis," and that "the shortest existing applicable process" under NEPA had to be used.

The Barrasso-Boxer amendment, which became Section 1609 of the Recovery Act, had a huge impact. According to CEQ data, 192,707 NEPA reviews were required for Recovery Act projects; 184,733 of them were satisfied through the use of categorical exclusions.³³ 7,133 reviews went through an EA and received a finding of no significant impact (FONSI).³⁴ Only 841 required an EIS, the longest available process under NEPA.³⁵

Likewise, a statutory provision Congress passed in 2005 has been another success story for permit streamlining: Section 6002 of the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (SAFETEA-LU).³⁶ The structure of the RAPID Act is strikingly similar to Section 6002. Many of its best provisions—schedule requirements, concurrent reviews, and the statute of limitations—are identical to Section 6002. This section contains two key components: (1) process streamlining and (2) a statute of limitations. The process streamlining component does not in any way circumvent any NEPA requirement; in fact, the statute explicitly provides that "[n]othing in this subsection shall reduce any time period provided for public comment in the environmental review process." For the transportation projects covered by SAFETEA-LU, Section 6002 designates DOT as lead agency and requires early participation by other participating agencies. It requires federal agencies to conduct NEPA reviews concurrently (rather than sequentially), requires early identification and development of issues, and sets deadlines for decisions under other federal laws. The goal of the process streamlining provision was not to escape NEPA, but merely to facilitate interagency and public coordination so that the process could be sped up. The second key element in Section 6002 is a 180-day statute of limitations to "use it or lose it" on judicial review. Without such a provision, the prevailing statute of limitations is the default six-year federal statute of limitations for civil suits.

³² *AKM LLC v. Secretary of Labor, et al.*, No. 11-1106, 2012 U.S. App. LEXIS 6940, at *12 (D.C. Cir. Jan. 20, 2012).

³³ The Eleventh and Final Report on the National Environmental Policy Act Status and Progress for American Recovery and Reinvestment Act of 2009 Activities and Projects, available at http://ceq.hss.doe.gov/ceq_reports/reports_congress_nov2011.html.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Public Law 109-59 (2005).

Section 6002 has worked, and worked well. A September 2010 report by the Federal Highway Administration found that just the process streamlining component of Section 6002 has cut the time to complete a NEPA review in half, from 73 months down to 36.85 months.³⁷ The 180-day statute of limitations is cutting back on a typical NIMBY (“Not In My Backyard”) practice of waiting until the very last day to file a lawsuit against a project. Because the impact of waiting until the last day for filing of suits is to delay projects as long as possible, this tactic is particularly effective with a six-year statute of limitations. Even with the 180-day statute of limitations, groups still wait until the last week or last day to file, so that the project is delayed as long as possible.

Further evidence of the success of Section 6002 from SAFETEA-LU is the fact that the successor highway bill – Moving Ahead for Progress in the 21st Century Act (MAP-21) – adopted nearly all of the same process streamlining and environmental review provisions. MAP-21 was signed into law by President Obama on July 6, 2012 with votes of 373-52 in the House of Representatives and 74-19 in the Senate. Building upon SAFETEA-LU, MAP-21 includes an additional requirement that designated complex projects must be completed within 4 years, including the completion of any permit, approval, review, or study required for the projects. Significantly, Congress willingly went a step further on the statute of limitations provision in MAP-21, reducing the time allotted for filing a lawsuit from 180 days to 150 days. Of the five members of this Subcommittee serving at the time – Reps. Bachus (R-AL), Farenthold (R-TX), Issa (R-CA), Marino (R-PA), and Cohen (D-TN) – all voted for the bill.

D. The RAPID Act Delivers Effective Permitting Reform

The RAPID Act takes the most effective elements of SAFETEA-LU and MAP-21—concurrent reviews, deadlines, the statute of limitations—and applies them to all infrastructure projects. The RAPID Act almost exclusively relies upon concepts that are part of existing law and that have been shown to work in other contexts, such as SAFETEA-LU. Like SAFETEA-LU and MAP-21, the RAPID Act takes no rights away from agencies or the public to participate in the environmental review process.

Important reforms made by the RAPID Act include:

- Early designation of a lead agency, participating agencies and cooperating agencies when multiple agencies are involved in a NEPA review;
- Acceptance of state “little NEPA” reviews where the state has done a competent job, avoiding needless duplication of state work with the federal NEPA review;
- Imposition of a duty on agencies to involve themselves in the process early and comment early, with a failure to do so serving as a measure of procedural default;
- A reasonable process for determining the scope of alternatives, so that the NEPA review does not turn in to a limitless quest to evaluate millions of infeasible alternatives;

³⁷ Federal Highway Administration, *Integrating Freight into NEPA Analysis* (Sept. 2010), available at <http://ops.fhwa.dot.gov/publications/ihwahop10033/index.htm>.

- Consolidation of the process into a single EIS and single EA for a NEPA project, except as otherwise provided by law.
- Allowance of the project sponsor to participate in the preparation of environmental documents and provide funding—a reform made recently by California in state permit streamlining reforms;
- A requirement that each alternative include an analysis of employment impacts;
- Creation of a schedule for the EIS or EA, including deadlines for decisions under other Federal laws;
- Reasonable fixed deadlines for completion of an EIS or EA; and
- Reduction in the statute of limitations to challenge a final EIS or EA from six years down to 180 days.

The RAPID Act is a practical, industry-wide approach that makes the same changes to NEPA that the Obama Administration is currently doing on a case-by-case basis. Consider the 23 projects the Department of Interior announced it would streamline in February, 2013. Those projects are being expedited through a combination of improved coordination or cooperation among agencies, a process for dispute elevation and resolution, and a schedule for document reviews. The RAPID Act requires these same concepts: early coordination, concurrent reviews, prompt identification of the lead agency, early invitation of participating agencies, a schedule for completion of the review, and a predictable 180-day statute of limitations.

Because the RAPID Act changes the procedure for administering an environmental law, there likely will be groups that decry the bill as an affront to environmental protection. But the fact remains that the RAPID Act makes only procedural changes. It amends the Administrative Procedure Act, not the organic NEPA statute. The bulk of the bill has been enacted in other contexts and has proved successful without impeding the rights of any private citizen.

The shorter statute of limitations—which, again, has worked as part of SAFETEA-LU and MAP-21—fixes what essentially is a loophole in the system, the six-year statute of limitations to challenge final NEPA action. Consider that a challenge to a final regulation (which in most circumstances has a much greater impact on the public than a single project) is limited to 60 days; why then does a challenge to a different final agency action, an EIS, require six years? The RAPID Act harmonizes judicial review of NEPA decisions with review of other final agency actions under the Administrative Procedure Act.

Most importantly, the RAPID Act addresses the common problem that *Project No Project* identified: that project delays cost money and jobs. To those that question why deadlines are needed for the completion of a project, the response is simple and clear: they are needed to create jobs. *Project No Project* showed that in the energy sector alone, one year of delay translates into millions of jobs not created. The Chamber believes the creation of millions of jobs is worth forcing our government to work a little faster. The RAPID Act accomplishes this goal.

III. CONCLUSION

As *Project No Project* shows, trillions of dollars and millions of American jobs can be created if projects can complete their permitting on a timely basis. NIMBY activism has blocked projects of all shapes and sizes through tactics such as organizing local opposition, changing zoning laws, opposing permits, filing lawsuits, and using other long-delay mechanisms, effectively bleeding projects dry of their financing. There is simply no reason for the United States to be tied with Papua New Guinea for last place in the world on the time it takes to permit a new mine.³⁸

The RAPID Act restores Congressional intent and allows environmental reviews under NEPA to function as designed. It sets forth a common-sense procedure for completion of environmental reviews—one that already works in the transportation context and has enjoyed broad, bipartisan support. And, the RAPID Act does not remove or modify any public citizen's right or ability to participate in the NEPA process.

If enactment of the RAPID Act could have the same impact on energy, forest management, and intermodal projects that SAFETEA-LU Section 6002 and MAP-21 have had on transportation projects, Congress will have done wonders to create jobs and boost our economic recovery. The Chamber strongly supports passage of the RAPID Act and stands ready to work with the Subcommittee to move the bill through Congress. Thank you for the opportunity to testify today. I look forward to answering any questions you may have.

³⁸ 2012 Ranking of Countries for Mining Investment, Bchre Dolbear Group at 8. See www.dolbear.com.

Mr. BACHUS. Mr. Duffy?

**TESTIMONY OF DENNIS J. DUFFY, VICE PRESIDENT
AND COUNSEL, CAPE WIND ASSOCIATES, LLC**

Mr. DUFFY. Good morning. My name is Dennis Duffy, Vice President of Cape Wind Associates, LLC. For the past 12 years, Cape Wind has been developing the Nation's first offshore generation project at an expense in private capital now exceeding \$50 million.

Cape Wind enjoys strong support of environmental, consumer advocacy, and labor groups and the overwhelming majority of Massachusetts voters. However, there is strong opposition funded primarily by a few wealthy landowners who may be able, on clear days, to see the project off on the horizon.

The principals of our company have been in the business of developing and operating energy infrastructure projects for more than 30 years. We have developed and operated some of the most efficient natural gas-fired plants operating in the United States, as well as the Nation's two largest biomass plants and New England's largest solar generation project. We are, thus, intimately familiar with the Federal and State licensing processes for major energy projects.

Offshore wind technology has now advanced to the point where it is both proven and reliable and can play a much more meaningful role in our national supply mix, and we undertook this project in specific response to policy directives from the Commonwealth of Massachusetts. However, if we are to realize the potential of these new energy resources, we need to ensure that our national energy and environmental policies are implemented in a consistent and timely manner. We know that this technology works. Although Cape Wind will be the first offshore wind farm in the United States, 55 such projects are already operating successfully in Europe, and the Chinese, after having started well after us, already have projects in service.

One fundamental challenge to the development of energy projects is the lack of any limitation on the duration of the Federal review periods. As a result, with no required endpoint, opponents can use regulatory stalling and delay tactics to try to financially cripple even a project that meets all statutory standards and serves Federal and State policy objectives. Indeed, the chairman of our opponents' group recently admitted in the press that his strategy is one of "delay, delay, delay."

Cape Wind submitted its Federal permit application to the U.S. Army Corps of Engineers in 2001. The BOEM issued a highly positive and 5,000-page environmental impact statement in 2009, and Secretary Salazar then issued the first lease for an offshore wind farm to Cape Wind in 2010 and approved our construction and operation plan in 2011. The project has been undergoing extensive regulatory and public scrutiny for more than 12 years and has now received all major permits and approvals. It also now has entered into two long-term contracts with major utilities, which have been approved by the Massachusetts Department of Public Utilities as cost effective and in the public interest.

The NEPA review of Cape Wind's application was a process that included the active participation of 17 Federal and State partici-

pating agencies and afforded exceptional opportunities for public involvement. In addition, there has been extensive State regulatory review. After an exhaustive process, including 20 days of expert testimony, the Massachusetts Siting Board approved Cape Wind's petition. In addition, the Massachusetts Department of Public Utilities approved Cape Wind's long-term sales agreement on a finding that it was cost effective and in the public interest.

Still at this juncture, the project is facing appeals. In response, I would like to make three specific policy recommendations.

First, limit the time period for agency review. National policy objectives would be far better served if environmental review of renewable facilities were conducted on a fixed timeline. We reference, for example, for your consideration the energy facilities siting acts of several of the New England States which provide a thorough environmental review of energy facilities within a statutorily limited time frame. In particular, the Massachusetts Siting Act limits the review period to 12 months from the date of filing an application. The Massachusetts act was adopted in 1973 on a bipartisan basis and has withstood the test of time.

Secondly, we would encourage the consolidation and expedition of judicial review. And as noted in my testimony, there are several recent examples—this has been done in the Congress—for the Alaska Natural Gas Pipeline Act, as well as for offshore natural gas facilities. And I note in this regard that the Massachusetts siting statute also provides for an appeal of any Siting Board decision directly to the Commonwealth's highest court and that the appeals must be brought within 20 days to expedite a final resolution. Further, the Siting Act allows the board to grant a consolidated approval in lieu of any other State or local approvals that would otherwise be required, in a sense one-stop shopping, in which case the project would face only one consolidated appeal taken directly to the State's highest court.

If the Nation is to encourage development of new resources, streamlining the administrative and judicial review process would be a most effective mechanism for getting facilities on line and it could be done without modifying any substantive right of review by any aggrieved party.

Thank you.

[The prepared statement of Mr. Duffy follows:]

ENHANCING RENEWABLE ENERGY POTENTIAL:
STREAMLINING ENVIRONMENTAL REVIEW

Statement of Dennis J. Duffy,
Vice President
Cape Wind Associates, LLC
before the
U.S. House Committee on the Judiciary,
Subcommittee on Regulatory Reform

July 11, 2013

1. Introduction

I appreciate this opportunity to address the Committee. My name is Dennis J. Duffy, Vice President and Counsel of Cape Wind Associates, LLC ("Cape Wind"). For the last twelve years, Cape Wind has been developing the Nation's first offshore wind generation project. The project's nearest point to land will be approximately 5 miles off the on the coast of Massachusetts. Most of the turbines will be 6 – 10 miles from the nearest shore. It would generate 468 MW of clean and renewable energy, with no fuel requirements and no air emissions, and would produce at its peak during the daylight hours of greatest consumer demand. This amount would represent approximately 75% of the annual electricity needs of Cape Cod and the Islands of Martha's Vineyard and Nantucket. The Cape Wind project would be located on a shoal that is outside of the shipping lanes and would impose no restrictions on current uses of the area. Cape Wind enjoys strong support of environmental, consumer advocacy and labor groups and the overwhelming majority of Massachusetts voters. However, it has drawn opposition funded primarily by a few wealthy landowners who may be able, on clear days, to see the project off on the horizon.

The principals of our company have been in the business of developing and operating energy infrastructure projects for more than thirty years. We have developed and operated some of the most efficient natural gas-fired plants operating in the United States, as well as the nation's two largest biomass plants and New England's largest solar generation project. We are intimately familiar with federal and state licensing processes for electric power plants. In direct response to mandates of the New England States for renewable energy, we are now focusing upon offshore wind energy

development, which is uniquely well-situated to serve the population centers of the East coast. Offshore wind energy technology has now advanced to the point where it is both proven and reliable and can play a much more meaningful role in our National supply mix. A study commissioned by the Department of Energy entitled “A National Offshore Wind Study” estimates that America’s offshore wind could generate 4,150 GW, approximately four times the current generating capacity of the Nation. However, if we are to realize the potential of new energy sources, we need to ensure that our National energy and environmental policies are implemented in a consistent and timely manner. We know that this technology works. Although Cape Wind will be the first offshore wind farm proposed in the United States, 55 projects are operating successfully in Europe, and the Chinese, after starting much later than us, have already now deployed their first offshore project.

2. Federal Regulatory Process

The Federal and state regulatory processes for offshore renewable energy are thorough and comprehensive, but often not coordinated. One fundamental challenge is the lack any limitation on the duration of the Federal review periods. As a result, with no required end point, opponents can use regulatory stalling and delay tactics to try to financially cripple even a project that meets all statutory standards and serves Federal and State policy objectives. Indeed, the Chairman of our opponents’ group recently admitted in the press that his strategy is one of “delay, delay, delay.”

Cape Wind submitted its Federal permit application to the U.S. Army Corps of Engineers (“USACE”) in November of 2001, pursuant to section 10 of the Rivers and Harbors Act, which governs the placement of structures in Federal waters.

The Corps considered the project for several years and issued a favorable Draft EIS in November, 2004. However, pursuant to the Energy Policy Act of 2005, The Department of the Interior (MMS, now BOEMRE) became the lead federal agency and essentially the process had to begin anew. BOEMRE conducted its own multi-year review process and issued a highly positive Environmental Impact Statement in January of 2009 and its Record of Decision was issued 15 months later, in April of 2010. Secretary Salazar then issued the first lease for OCS renewable energy to Cape Wind in October of 2010 and BOEMRE approved our Construction and Operation Plan (the “COP”) in April 2011. The project thus has been undergoing extensive regulatory and public scrutiny for more than 12 years, and has now received all major permits and approvals. It has also now entered into two long-term contracts with major utilities, which have been approved by the MDPU as “cost-effective” and in the public interest.

The environmental review of Cape Wind’s application was a process that has included the active participation of 17 Federal and State participating agencies and afforded exceptional opportunities for public involvement. During this process, an exhaustive analysis of all potential impacts of the project was conducted, including studies of issues including potential impacts upon existing uses, environmental issues, including potential impacts to fish, birds threatened species and marine mammals, protection of Native American rights, project aesthetics, cost implications and the energy needs of the public.

State Regulatory Process

In addition, there have been extensive state regulatory proceedings. In September of 2002, Cape Wind petitioned the Massachusetts Energy Facilities Siting

Board (“MEFSB”) for authorization of its facilities located within Massachusetts. After an exhaustive review, including 20 days of expert testimony, on May 10, 2005, the MEFSB approved Cape Wind’s petition based upon its findings that Cape Wind’s energy is needed (i) to reliably meet the growing need for power in the region; (ii) to stabilize prices to electric rate payers; and (iii) to offset air emissions from fossil generators. Moreover, in 2009 the MEFSB issued a Certificate of Environmental Impact and Public Interest to Cape Wind and such grant has been upheld on appeal by the Massachusetts Supreme Judicial Court. In addition, the Massachusetts Department of Public Utilities has approved Cape Wind’s long-term power sales agreements with National Grid and Northeast Utilities, finding that “it is abundantly clear that the Cape Wind facility offers significant benefits that are not currently available from any other renewable resource” and that the “benefits outweigh the costs of the project.” D.P.U. 10-54.

3. Judicial Appeals.

Along the way, opponents sought to appeal regulatory decisions to the federal or state courts, and Cape Wind has prevailed in 13 cases to date. Notwithstanding this extensive review and the appeals we have already won, the project still faces appeals of its federal approvals brought by well-funded special interest groups that have sought to delay the review process at every turn. In light of our experiences on this project, we offer the following three policy suggestions for your consideration.

4. Policy Recommendations

A. Limit Time Periods of Agency Review.

First, national policy objectives would be far better served if the environmental review of proposed renewable energy facilities were conducted in a

timelier manner, pursuant to specific statutory timeframes that prevent delay tactics from financially crippling important and worthy projects. We recognize and applaud the progress that has been made by BOEMRE (including its “Smart from the Start” initiative), but firm deadlines applicable to all federal agencies would provide greater certainty to the review schedule. We reference as an example for consideration the energy facility siting acts that have been enacted by many of the New England states, which provide that a thorough and consolidated environmental review of major energy facilities is to be conducted within a statutorily-limited time frame, which is limited by the Massachusetts Energy Facilities Siting Act to 12 months from the date of filing of the application. M.G.L. c. 164, sec. 69J. The Massachusetts Act was adopted in 1973 and has withstood the test of time.

B. Consolidate and Expedite Judicial Review.

Second, renewable energy projects often require multiple federal approvals, each of which is subject to judicial review, processes which can consume additional years and substantial funds. Renewable energy projects that require multiple federal approvals could be expedited significantly if all such reviews were consolidated into a single appellate proceeding brought directly before the Court of Appeals.

There is ample precedent for such a provision in recent Federal energy legislation. The Alaska Natural Gas Pipeline Act of 2003 at section 720e provides for expedited consideration and exclusive review in the D.C. Circuit of any order or action of a federal agency or any challenge under NEPA related to the authorities in the Act. Similarly, the Energy Policy Act of 2005, section 313, provides for development of a

single consolidated record and for exclusive jurisdiction and expedited consideration by the D.C. Circuit Court of Appeals relating to construction of certain natural gas facilities.

The Massachusetts Energy Facilities Siting Act similarly provides for appeal of Siting Board decisions directly to the Commonwealth's highest court, which appeals must be brought within 20 days, so as expedite final resolution. The Act further provides for the Siting Board to grant a consolidated approval, in lieu of any other state or local approvals that would otherwise be required, in which case the project would face only one consolidated appeal, taken directly to the state's highest court.

If the Nation is to encourage the development of new energy resources, streamlining the judicial review process would be a most effective mechanism for getting facilities on line, and could do so without modifying any substantive rights of review by any aggrieved party.

C. Coordinate Permit review Timelines with the Duration of Investment Incentives.

Third, Congress should address the fact that federal investment incentives for long lead-time renewable energy projects (such as offshore wind, geothermal and biomass projects) are typically put in place for time periods far shorter than the time required for permitting and environmental review. For example, current provisions for the Investment tax Credit ("ITC") and the Production Tax Credit ("PTC") are set to expire at the end of 2013 -- a time frame that is too short to allow for the review of many proposed projects.

The result is an untenable situation where investors in proposed projects must proceed without knowing whether crucial incentives will still be in effect when such projects have completed the review process and are able to commence construction.

These incentive durations may be workable for projects that take only one or two years to develop, but they are not workable for types of projects with longer permitting timelines. To be effective, tax and other incentives for long lead-time projects must be in place for longer periods, or for stated volumes of additional projects. We thus suggest a long-term extension of tax incentives for offshore wind and other long lead-time renewable projects to at least 2016 or, as currently proposed in S. 401 and H.R. 924, for the first 3,000 MW of offshore wind projects to come on line, a measure which would provide a more certain and dependable signal to the investment community facing long-led time developments.

With these changes, I am certain that America can catch up to the current world leaders in offshore wind development, and achieve the objectives of energy independence, green jobs, reductions in air emissions and diversity of energy supply.

Thank you for your consideration.

Mr. BACHUS. Thank you very much, Mr. Duffy, for your outstanding testimony.

Mr. Slesinger?

**TESTIMONY OF SCOTT SLESINGER, LEGISLATIVE DIRECTOR,
NATURAL RESOURCES DEFENSE COUNCIL**

Mr. SLESINGER. Thank you, Mr. Chairman, Members of the Committee. Thank you for the opportunity to testify today. My name is Scott Slesinger and I am the Legislative Director of the Natural Resources Defense Council. NRDC is a nonprofit organization of scientists, lawyers, and environmental specialists dedicated to protecting public health and the environment.

Many of the problems the environmental community sees with this bill were detailed by Dinah Bear in her testimony on a similar bill last year. I have attached her testimony as her comments are just as relevant this year.

I will limit my testimony to some major points, address some of the myths surrounding NEPA, and leave comments on specific provisions from my written testimony and the Bear attachment.

But I must highlight one provision discussed on page 6 of my written testimony. That provision automatically approves all permits and licenses, including those under the Atomic Energy Act, if an agency fails to meet the deadlines placed in this bill. This provision prioritizes an artificial timeline over the concerns of Americans that the Government properly regulate the safety of nuclear power plants. We believe this provision's impact on the Atomic Energy Act and permits required under the Clean Air and Clean Water Act is a giant step too far.

I would like the Committee to appreciate why we have NEPA and why it is so important. With an emphasis on "Smart from the Start" Federal decision-making, NEPA protects our health, our homes, and our environment. The law was prompted in part by concerns from communities whose members felt that their views had been ignored in setting rules for the Interstate Highway Commission in the 1950's. When the Federal Government undertakes a major project, such as constructing a dam, a major highway, a power plant, or if a private entity uses a permit so it can pollute the air and water, we must ensure that the project's impacts, environmental and otherwise, are considered and disclosed to the public. And because informed public engagement often produces ideas, information, and solutions that the Government might otherwise overlook, NEPA has led to better decisions and better outcomes. The NEPA process has saved money, time, lives, historical sites, endangered species, and public lands while encouraging compromise and cultivating better projects with more public support. Our Web site highlights NEPA's success stories that prove this point.

But when projects are unique, such as Cape Wind, a project NRDC supports, or if a project has well-funded opposition, such as Cape Wind, the process can be significantly delayed. But NEPA is not the cause of the delays this bill attempts to address.

What are the causes of delay? Most delays in Corps of Engineers projects is not NEPA. It is lack of funding. For instance, the Corps is funded in the House appropriations this year at \$4.6 billion, but

their backlog of congressionally approved projects is about \$60 billion. And this year's Senate bill authorizes \$12 billion more. When speaking to project sponsors, it has been very easy to blame delays on rules and regulations, environmentalists, and NEPA, but the real delay is more likely inadequate funding for projects that have been authorized.

Recent investigations by the Congressional Research Service addressing transportation projects makes a similar point, and I quote, "Causes of delay that have been identified are more often tied to local, State, and project-specific factors, primarily local and State agency priorities, project funding levels, local opposition to a project, project complexity, or late changes in project scope."

The Chamber of Commerce Web site that Mr. Kovacs just mentioned, Project No Project, bears this out. The report offers evidence in support of amending NEPA but actually includes very few stories that implicate NEPA as the cause of project cancellation or even delay. Far more often than not the cases on their Web site attribute delay and cancellations directly to State regulatory hiccups, county ordinances, State government veto threats, local zoning issues, and financing problems that are not part of the NEPA process. In short, the problem is NIMBY not NEPA.

NEPA is an important statute that is made incredibly complicated by this bill. This bill would overturn or conflict with many provisions adopted in MAP-21. Additionally, this bill would apply to the existing and contradictory requirements in the National Environmental Policy Act that is now not part of the APA, complicating the process and likely leading to delays, litigation, and uncertainty. And many of the provisions, as discussed in my written testimony, highlight impacts that are far-reaching and probably unintended.

On Tuesday, Members of this Subcommittee heard from my colleague, David Goldston, regarding the Regulatory Accountability Act. In that bill, the intent is to slow down the regulatory process. The RAPID Act is essentially the opposite of the RAA. In the RAA, the number of alternatives to consider are multiplied and the grounds for appeal are increased. Additional analysis of impacts are required, making the implementations of the country's laws passed by Congress much more difficult if not impossible to implement.

This bill is the opposite. Alternatives are limited. Deadlines force action or are defaulting to moving forward. Because permit approvals and EIS's are thought to delay construction projects, the RAPID Act makes it more likely that ill-conceived projects and unnecessarily expensive projects will move forward without a balance between the bias of the lead agency and those affected by the project. We believe those costs are just too high.

Thank you very much.

[The prepared statement of Mr. Slesinger follows:]

TESTIMONY BY SCOTT SLESINGER,
LEGISLATIVE DIRECTOR OF THE NATURAL RESOURCES DEFENSE COUNCIL

FOR THE HEARING ON H.R. XXXX, THE “RESPONSIBLY AND
PROFESSIONALLY INVIGORATING DEVELOPMENT ACT OF 2013”

BEFORE THE SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL
AND ANTITRUST LAW OF THE COMMITTEE ON THE JUDICIARY

JULY 11, 2013

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July 11, 2013
Room 2141 Rayburn House Office Building

Thank you for the opportunity to testify today. My name is Scott Slesinger, and I am the Legislative Director for the Natural Resources Defense Council (NRDC). NRDC is a nonprofit organization of scientists, lawyers, and environmental specialists dedicated to protecting public health and the environment. Founded in 1970, NRDC has more than 1.3 million members and online activists nationwide, served from offices in New York, Washington, Los Angeles, San Francisco, Chicago, and Beijing. I appreciate the opportunity to testify, and hope that my remarks will assist the Subcommittee as it considers the important issues raised by this bill.

Many of the problems the environmental community sees with this bill were detailed by Dinah Bear in her testimony on a similar bill in the last Congress before the Subcommittee on Courts, Commercial and Administrative Law. I have attached her testimony as her comments are just as relevant this year. I will limit my testimony to some major points, address some of the myths surrounding NEPA and explain why some of this bill's proposed changes to the NEPA process will likely encourage litigation and delay projects.

First and foremost, I would like the Committee to appreciate why this law is so important. With an emphasis on "smart from the start" federal decision making, the National Environmental Policy Act (NEPA) protects our health, our homes, and our environment. Passed by an overwhelming bipartisan majority and signed into law by President Nixon, NEPA has empowered the public, including citizens, local officials, landowners, industry, and taxpayers, and demanded government accountability for more than 40 years. The law was prompted in part by concerns from communities whose members felt their views had been ignored in setting routes for the Interstate Highway System, on which work began in the 1950s.

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NEPA is democratic at its core. In many cases, NEPA gives citizens their only opportunity to voice concerns about a federal project's impact on their community. When the federal government undertakes a major project such as constructing a dam, a major highway, a power plant, or if a private entity needs a permit so it can pollute the air or water, it must ensure that the project's impacts – environmental and otherwise – are considered and disclosed to the public. And because informed public engagement often produces ideas, information, and solutions that the government might otherwise overlook, NEPA leads to better decisions – and better outcomes – for everyone. The NEPA process has saved money, time, lives, historical sites, endangered species, and public lands while encouraging compromise and cultivating better projects with more public support. Our website <http://www.nrdc.org/legislation/nepa-success-stories.asp> highlights NEPA success stories that prove this point. Thanks to this law, tens of thousands of Americans have participated in important federal decisions.

Implementation of the NEPA process is nowhere near perfect. Many agencies have decimated their NEPA staff, leading to an over reliance on consultants instead of conducting analyses in-house. Since contract oversight requires ongoing agency approval, such statements are often delayed. Significant improvements to the process could be gleaned by providing adequately trained staff to handle this critical law. Inadequate environmental impact statements (“EISs”) are challenged for not adhering to the law, further delaying the process. However, unrealistic and arbitrary deadlines, particularly for the largest projects, could end up dragging it out even more. Only the largest projects are subject to the requirements for full environmental impact statements. For example, of the hundreds of transportation projects, the Department of Transportation estimates that only 3% are subject to full NEPA review.

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Projects like the Cape Wind offshore wind project –the first to be approved in the United States – have experienced delays, but these largely are due to the efforts of well-funded NIMBY opposition groups. NRDC is a strong supporter of the Cape Wind project. The NEPA process for the Project ensured that there was a full and transparent disclosure of the Project’s impacts and benefits, allowing NRDC and many other environmental groups to back the Project. While we understand Cape Wind’s frustration, gutting NEPA is not the answer.

During consideration of the 2013 Water Resources Development Act, there has been much discussion about delayed projects handled by the Corps of Engineers. But the reason for most delays in Corps of Engineers projects is not NEPA – it is a lack of funding. For instance, the Corps was funded in the House appropriations bill this year at \$4.65 billion, but the backlog of congressionally approved projects is about \$60 billion and this year’s Senate bill authorizes approximately \$12 billion more. Under Section 560(f) of the RAPID Act, a local project sponsor could force the Corps to immediately begin the NEPA process and finish in the timeframe demanded by the bill even if the project is unlikely to be funded for another generation. With sequester cutting agency budgets, should private entities be able to demand that the federal government waste its scarce resources on studies for projects unlikely to be funded instead of carrying out shovel-ready projects? Secondly, the EISs undertaken under this bill could easily be outdated by the time the projects find appropriation dollars. Imagine a flood control project EIS done in 2010 for Staten Island. Wouldn’t the experience of Superstorm Sandy make the original analysis useless? When speaking to project sponsors, it has been very easy to blame delays on rules and regulations, environmentalists, and NEPA but the real delay is more likely inadequate funding for projects that have been authorized.

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Recent investigations by the Congressional Research Service underscore both the genesis of delays in factors other than federal NEPA processes and how better resource allocation at a federal agency can expedite decision making. In relevant part summary, the report found that:

“The time it takes to complete the NEPA process is often the focus of debate over project delays attributable to the overall environmental review stage. However, the majority of FHWA-approved projects required limited documentation or analyses under NEPA. Further, when environmental requirements have caused project delays, requirements established under laws other than NEPA have generally been the source. This calls into question the degree to which the NEPA compliance process is a significant source of delay in completing either the environmental review process or overall project delivery. **Causes of delay that have been identified are more often tied to local/state and project- specific factors, primarily local/state agency priorities, project funding levels, local opposition to a project, project complexity, or late changes in project scopeⁱ.**”

The Chamber of Commerce website of Projectnoproject.com bears this out. It purports to offer evidence in support for amending NEPA, but actually includes very few stories that implicate NEPA as the cause of project cancellation or even delay. Far more often than not, the cases attribute delays and cancellations directly to state regulatory hiccups and funding shortfalls. County ordinances, state government veto threats, and local zoning issues are not part of the NEPA process. When investigating sources of delay in the transportation context, the most recent Congressional Research Service report noted that the available data “calls into question the degree to which the NEPA compliance process is a significant source of delay in completing either the environmental review process or overall project delivery.” The report went on:

“Further, approaches that have been found to expedite environmental reviews involve procedures that local and state transportation agencies may implement currently, such as efficient coordination of interagency involvement; early and continued involvement with stakeholders interested in the project; an identifying environmental issues and requirements early in project development.”ⁱⁱ

One of the most overreaching subsections (Section 560(h)(4)(C)) in this bill allows the automatic approvals of permits and licenses under the Clean Water Act, the Clean Air Act and even the licensing requirements under the Atomic Energy Act if the deadlines in the bill are not met. This subsection would automatically approve any permit or license related to a major federal if the deadlines, which are as short as one year, are not met. For all practical purposes it could remove Nuclear Regulatory Commission (NRC) authority over the approval of most of its licensing activities, including licenses of nuclear power reactors, waste management sites, nuclear fuel facilities, and waste disposal facilities. It would automatically lead to the approval of any selected geological disposal site for the disposal of spent nuclear fuel and high level radioactive waste, before the safety review is completed. At best it would short circuit the safety and nonproliferation reviews of a wide variety of very hazardous nuclear activities in the civil and national security/nuclear weapons areas.

The reason for delays could be staffing, the size of the project or administrations wanting to sit on their hands to get automatic approvals. Budget limitations could also delay actions, particularly in this era of the budget sequester.

In addition, the right to challenge these automatic approvals is suspect. This provision states that a “court may not set aside such agency action by reason of that agency action having occurred

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under this paragraph [deem approval after the deadline is missed].” For instance, if the Corps just doesn’t do anything with a dredge and fill permit application by the deadline, regardless of the reason, it is automatically approved. A downstream entity – whether a local government, business, or citizen group – could sue because the Corps did not undertake a public interest review or because there were less damaging alternatives that avoided impacts to aquatic systems. The Corps could argue the reason the record does not contain any information on those things is that this permit was automatically approved. There is no record to contest that the Corps was arbitrary and capricious. We urge the Committee to drop these provisions.

Section 560(g) of the bill deals with the important issue of alternatives analysis. The analysis of reasonable alternatives to achieve an agency’s purpose and need in moving forward with a proposed action is, by definition, the heart of the environmental impact statement process. This bill limits consideration of alternatives to those that could be carried out by the project sponsor. Linking alternatives analysis to one particular proponent could undercut the private sector competitive process. In a number of situations, an opportunity for development of a particular type of project is apparent to a number of private sector entities. An agency may receive multiple applications for a transmission line, an energy project, or some other sort of project within roughly the same timeframe. Under H.R. XXXX, if a project sponsor is a bridge builder, a tunnel is not a possible alternative and vice versa. In those circumstances, a lead federal agency should be able consider the needs and requirements of both the public in the context of national policy and all of the applicants.

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Several sections intended to speed up the NEPA process are of questionable benefit. Section 560(e)(8) does not allow agencies to comment on areas outside their area of expertise. For instance, in comments on expansion of the Palmdale Airport near the Edwards Air Force base, the Air Force expressed concerns about the airport's impact on, groundwater recharging, and landfill capacity. This subsection would have prevented the Air Force from submitting these comments.

The deadlines in the bill affect the most complicated and unique projects. Having these strict deadlines will undercut the public's ability to have a say on major federal spending. EISs can be detailed and technical. Under this bill, all the documents must be limited to one document. Requiring the public to digest such documents and comment in as few as 30 days essentially cuts the public out of the process. Consider a flood control project that benefits a particular community. Shouldn't the community that will be impacted by these diverted waters have a fair chance to comment?

Subsections 560(e)(3) and (4) are also questionable in that they undercut our federalist system. These provisions seems to preclude any entity, including agencies, governors, or local governments that do not becoming participating agencies from "submitting comments on any NEPA document prepared for that project or taking any measures to oppose, based on the environmental review, any permit, license, or approval related to that project." The language is unclear but should be clarified that such agencies foreclosed from participating because they did not become participating agencies should not include non-federal levels governmental entities. To do so would undercut the ability of our local and state governmental leaders from protecting their citizens and their states. This radical reduction of state and local rights can be fixed by clarifying that the word "agencies" does not include non-federal entities.

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NEPA is an important statute that is made incredibly complicated by this bill. This bill would overturn or conflict with many provisions adopted through the 2012 NEPA transportation legislation. Additionally, this bill would apply in addition to the existing and contradictory requirements of NEPA requirements that are now not part of the APA, complicating the process and likely leading to delays, litigation, and uncertainty.

Members of this subcommittee heard from my colleague, David Goldston on Tuesday regarding the Regulatory Accountability Act (RAA). In that bill, the intent is to slow down the regulatory process. The RAPID Act is essentially the opposite of the RAA. In the RAA, the number of alternatives to consider are multiplied, and the grounds for appeal are increased; additional analysis of impacts are required, making the implementation of the country's laws passed by Congress much more difficult—if not impossible. This bill does the opposite. Alternatives are limited; deadlines force action or default to moving forward. Because permit approvals and EISs are thought to delay construction projects, the RAPID Act makes it more likely that ill-conceived projects and unnecessarily expensive projects will move forward without a balance between the bias of the lead agency and the views of those affected by the project. We believe that such a cost is too high.

¹ "The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress", CRS 7-5700, R42479, April 11, 2012.

² Ibid.

ATTACHMENT**HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW****HEARING ON H.R. 4377 - THE RESPONSIBLY AND PROFESSIONALLY
INVIGORATING DEVELOPMENT ACT OF 2012 (The "Rapid Act")**

April 25, 2012
Room 2141 Rayburn House Office Building

Introductory Remarks

Thank you for the invitation to appear before the Subcommittee on Courts, Commercial and Administrative Law in regards to H.R. 4377, The Responsibly and Professionally Invigorating Development Act of 2012. I appreciate the opportunity to testify, and hope that my remarks will assist the Subcommittee as it considers the important issues raised by H.R. 4377.

By way of background, the Council on Environmental Quality (CEQ) is the agency established by Congress with responsibility for overseeing the National Environmental Policy Act, the subject of much, although by no means all, of H.R. 4377's focus. I was asked to serve as the Deputy General Counsel for the Council on Environmental Quality (CEQ) with President Reagan's team in 1981. In 1983, I was appointed as General Counsel, a non-career position. In that role, I had responsibility for oversight of agency implementation of NEPA. I remained in that position throughout the remainder of President Reagan's tenure and that of President George H.W. Bush. I resigned from CEQ in October, 1993 and resumed responsibilities as General Counsel in January, 1995. I remained at CEQ during the Clinton and George W. Bush administrations until the end of calendar year 2007, when I retired from federal service. My husband and I moved to Tucson, Arizona last year and I continue to be active in the field of environmental law generally and NEPA specifically.

As this bill is considered, it is important to recall the purpose of the NEPA process. NEPA does not regulate the private sector. Rather, it informs government agency decisionmaking, with the help of public involvement. The NEPA process helps to ensure that agency employees "look before they leap" so that federal dollars are spent wisely through the identification of less controversial, feasible and less costly alternatives. It is also the framework for identifying appropriate mitigation measures that could resolve problems for both the project proponent and the public resources during and after project implementation. It provides an important opportunity – often the only opportunity – for the public to influence federal agency decisionmaking.

While someone who reads H.R. 4377 quickly may assume that the bill is directed only at environmental laws, principally NEPA, the bill's explicit deadlines for decisionmaking as well as for environmental review and compliance processes implicitly amend dozens of unidentified authorizing statutes for every federal agency in the executive branch. It approaches changes to environmental law requirements by relying on what is generally referred to as the NEPA process and through required amendments to CEQ's regulations implementing the procedural provisions

of NEPA (40 C.F.R. Parts 1500-1508). All other agencies and departments would be required to undertake rulemaking to conform to the requirements of the bill, for changes to NEPA procedures, other federal environmental laws, their authorizing legislation, and for some agencies, their administrative appeals processes.

I understand that this legislation represents the frustrations of those who perceive environmental laws and regulations to be the major cause of unwarranted delays in approval of construction projects that require federal approvals or for which federal funding is sought. Environmental review processes are not always conducted perfectly, from anyone's perspective. However, the role of environmental regulation in project delays is often taken out of context and overplayed in comparison to other causes of delay. As a result, proposed solutions often fail to address the real causes of those delays that really are unnecessary and related to environmental issues. A major premise of this bill appears to be the belief that foot-dragging or recalcitrance by government agencies is the principal cause of delay in achieving compliance with environmental laws and reaching decisions. The bill addresses this premise through provisions that in some instances eviscerate the line between the role of government and private sector project proponents, require federal agencies and federal courts to ignore information, and mandate a "one size fits all" solution to the perceived cause of delay. It is not clear from the bill that the relationship between provisions in this statute and the other laws it affects has been thought through. A consistent theme in the bill is that the foreordained outcome of environmental review and compliance processes should be the rapid approval of all proposed projects, a premise that is inconsistent with law in some cases and good public policy as an across-the-board proposition.

Causes of Delay

While the causes of project delay have not been systematically documented throughout the government for all actions, the body of information available has improved greatly since GAO noted in 1994 that there was no repository of information on highway projects and their environmental reviews.¹ In particular, some valuable analysis has been done on this issue in the context of highway construction. Since at least the mid-1990's, two Congressional agencies, the General Accounting Office/General Accountability Office (GAO), and the Congressional Research Service (CRS), have prepared a series of reports, remarkably consistent in their findings, regarding the construction of highway projects and the relationship of environmental laws generally and NEPA specifically to decisionmaking timelines. Some of this research is relevant to construction in other federal contexts, but certainly, this type of research is needed more broadly if agencies and/or legislators are going to be able to formulate successful approaches to reducing delays.

By 2002, improvement in baseline data and more specific identification of factors affecting completion time was available, concurrent with the implementation by both federal and state highway agencies of initiatives to improve the efficiency of environmental review processes. Significantly, these initiatives included the use of interagency funding agreements to

¹ "Highway Planning: Agencies are Attempting to Expedite Environmental Reviews, but Barriers Remain", GAO/RCED-94-211, p. 7.

hire additional staff at state and federal environmental agencies.² This was a very important move, confirmed by a 2003 GAO report that found that 69% of transportation stakeholders reported that state departments of transportation and federal environmental agencies lacked sufficient staff to handle their workloads.³ While a similar analysis has not been done for other departments and agencies, based on my observations of trends in agency planning and compliance budgets, I believe that similar or much more severe staff shortages exist for many programs.

Recent investigations by CRS underscore both the genesis of delays in factors other than federal NEPA processes and how better resource allocation at a federal agency can expedite decisionmaking. Three weeks ago, CRS issued a report on the environmental review process for federally funded highway projects. In relevant part summary, the report found that:

“The time it takes to complete the NEPA process is often the focus of debate over project delays attributable to the overall environmental review stage. However, the majority of FHWA-approved projects required limited documentation or analyses under NEPA. Further, when environmental requirements have caused project delays, requirements established under laws other than NEPA have generally been the source. This calls into question the degree to which the NEPA compliance process is a significant source of delay in completing either the environmental review process or overall project delivery. Causes of delay that have been identified are more often tied to local/state and project-specific factors, primarily local/state agency priorities, project funding levels, local opposition to a project, project complexity, or late changes in project scope. Further, approaches that have been found to expedite environmental reviews involve procedures that local and state transportation agencies may implement currently, such as efficient coordination of interagency involvement; early and continued involvement with stakeholders interested in the project; an identifying environmental issues and requirements early in project development.”⁴

Importantly, this report points out that while much work has been done to document delays and improvements in timelines related to highway construction, very little work has been done to understand why certain types of delays occur. One government study suggested that a major affect was actually external social and economic factors associated with different geographic regions of the country.⁵ As noted above, in my view, staff shortages clearly have been a major factor and the highway department funding of staff has, I understand, improved the situation in that area. But little analytical work has been done regarding federally assisted or funded construction that takes place in other contexts.

Project Sponsor Responsibilities

² “Highway Infrastructure: Preliminary Information on the Timely Completion of Highway Construction Projects”, GAO-02-1067T.

³ “Highway Infrastructure: Stakeholders’ Views on Time to Conduct Environmental Reviews of Highway Projects”, GAO-03-534, p. 5.

⁴ “The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress”, CRS 7-5700, R42479, April 11, 2012.

⁵ *Id.* at p. 35.

Now let me turn to the Responsibly and Professionally Invigorating Development Act of 2012. By definition, “project sponsors” for purposes of this bill includes both public and private entities as well as public-private entities.⁶ “Projects” are defined as construction activities “undertaken with Federal funds or that require approval by a permit or regulatory decision issued by a Federal agency.”⁷ The first provision of the bill following the definitions articulates the role of project sponsors in the NEPA process. “Upon the request of any project sponsor”, the project sponsor may prepare any NEPA document (including an environmental impact statement) in support of its proposal. § 2(c)(1). The provision goes to state that in such cases, the lead agency must furnish oversight and independently evaluate, approve and adopt the document prior to taking action based upon it.

This blurring of the distinction between government and private sector roles in the context of a process designed to inform government action is extremely troubling. This is particularly true because projects that require an environmental impact statement (EIS) are those that by definition may have genuinely significant impacts. Government agencies, whether at the federal, state, tribal or local level, are structured to represent the public and are accountable to the public through a variety of mechanisms. Corporations have legitimately different responsibilities to their shareholders. Both the public at large and corporate shareholders have the right to expect these respective sectors to behave in ways that are responsible about those distinctions.

Project sponsors, whether governmental or private, already have a central role in the NEPA process. Many, if not most, proposed actions analyzed under NEPA are, of course, initiatives of the lead agency itself. State agencies proposing a project may prepare EISs and other NEPA documents under conditions set out in Section 102(2) (D) of NEPA. State, local and tribal government project proponents may become joint lead agencies with federal agencies when they have similar environmental review requirements, or cooperating agencies when they have jurisdiction by law over some component of the project or special expertise regarding any environmental impact associated with one or more of the alternatives to be analyzed. 40 C.F.R. §§ 1501.5(b), 1506.2, 1500.5(b), 1502.1(b), 1501.5(c), 1501.5(f), 1501.6, 1503.1(a) (1), 1503.1, 1503.3, 1506.3(c), 1506.5(a), 1508.5. Private sector project sponsors may submit whatever information they choose to the lead agency and to prepare environmental assessments (EAs). 40 C.F.R. § 1506.5. Due to inadequate agency budgets, project sponsors also often choose to pay for preparation of an EIS by a consultant or contractor that is chosen by and works under the direction of the lead agency to expedite EIS preparation.

However, the law has always wisely drawn a line between private sector and public project proponent involvement when the proposed action is one that triggers the statutory requirement for a “detailed statement” for proposed actions significantly affecting the quality of the human environment, that is, an EIS. In that situation – a very small percentage of the thousands of actions falling under NEPA annually – the distinction between private sector project proponents and government agencies is drawn more sharply. Private sector project proponents are not permitted to prepare EISs. Any contractor selected by the agency to prepare the EIS must execute a disclosure statement prepared by the lead agency specifying that it has no

⁶ Section 2(b) (12).

⁷ Section 2(b) (11).

financial or other interest in the outcome of the project. 40 C.F.R. §1506.5(c). Obviously, a private sector project sponsor inherently has a financial interest in the project.

The public is already concerned about the integrity of the process, especially when it knows that the proponent is funding preparation of the EIS. The provisions in this section intended to be safeguards regarding government agency oversight and approval of NEPA documents prepared by proponents are not sufficient to ensure that integrity and, in fact, are weaker than those already required under NEPA for state project proponents.

This extremely serious concern is exacerbated in the next provision of the bill, Section 2(c)(2), that authorizes lead agencies to accept “voluntary contributions of funds from a project sponsor” for purposes of either undertaking the NEPA process or making a decision under another environmental law for the sponsor’s proposed project. Under this provision, corporate money could be used to pay for the preparation, oversight and approval of a NEPA document, a Section 7 consultation under the Endangered Species Act, a Clean Water Act permit, etc. These are inherently government functions that benefit the public at large (as well as the proponent) and should be financed with government funds rather than from private sources that raise the specter of a conflict of interest.

Limitation on Number of NEPA Documents

Another major concern with this legislation arises from the restrictions found in Section 2(d) regarding the number of EISs and EAs. The bill would limit an agency to “not more than 1” EIS and EA per proposed project and “no Federal agency responsible for making any approval for that project may rely on a document other than the environment document prepared by the lead agency.” This section is a solution in search of a problem, since agencies generally do not seek out opportunities to prepare additional EISs. Indeed, decisions to prepare a revised or supplemental EIS or additional EA are usually painful ones reached after much internal discussion within an agency. However, the fact is that sometimes NEPA documents prove to be seriously inadequate and must be revised or supplemented to remedy those inadequacies. And the fact remains that sometimes there are major new developments, whether of a legal, policy or factual nature, that require additional analysis. An artificial cap to the number of NEPA documents that can be prepared will not change these facts; it will simply put the analyses out of sync with the needs of decisionmakers and the public. And because, under the bill, all federal agencies would have to rely on an EA or EIS for compliance with more than 30 other federal environmental laws, every document needed for compliance would now have to be included in the NEPA document, thus lengthening considerably every one.

It is unclear how this provision would be interpreted in the context of programmatic EISs and tiering. For example, every military installation prepares an installation plan under the Sikes Act. That installation plan, which is the subject of NEPA compliance, may approve future construction of a major building complex or weapons testing area. Several years later, the installation may need to do another EIS focused specifically on that construction. It is not clear whether the installation would be prohibited from doing the second EIS under this provision.

Similarly, this limitation would create confusion and litigation issues in the context of judicial remedies. A typical remedy when a federal court has determined that a finding of no significant impact was inadequately justified is the preparation and issuance of additional NEPA analysis addressing the deficiencies identified by the court. It is not clear whether this provision eliminates the judicial branch's ability to provide agencies with another opportunity to comply with the law by issuing a new EA or EIS. Taken literally, this provision could require that a defective EA be replaced only with a full EIS, or if both an EA and an EIS already addressed a project, could leave a court with no remedy other than to enjoin a federal agency from proceeding with the proposed action at all, because there was no ability to undertake further compliance.

Adoption of State Documents

The bill also provides that "upon the request of a project sponsor" (public or private), a lead agency must adopt a document prepared under a state environmental impact assessment law if the state law and procedures at issue are "substantially equivalent to NEPA".⁸ CEQ would be given 180 days to designate which state environmental impact assessment laws meet that criterion, along with undertaking additional rulemaking to conform to the requirements of this bill in the same period.

Coordination between federal agencies and states with environmental impact assessment laws is extremely important. Clearly, the preferred situation for both the proponent and the public is for both federal and state laws to be complied with through a single process. As a result, the CEQ regulations already provide for joint planning processes, joint environmental research and studies, joint public hearings (except where otherwise required by another law), joint environmental assessments and joint environmental impact statements. In these cases, the appropriate state agency may be a joint lead agency. Where state laws or local ordinances have EIS requirements in addition to but not in conflict with those in NEPA, federal agencies are instructed to cooperate in fulfilling those requirements as well so that one document will comply with all applicable laws. 40 C.F.R. 1506.2. This approach under existing law can work very well, and I have seen many examples of joint federal/state environmental review documents. Further, as mentioned earlier, state agencies are permitted under NEPA to take responsibility for the preparation of an EIS under NEPA. Additionally, I believe some states have provisions in their state laws to allow the adoption of NEPA documents to support their own requirements under certain circumstances. These approaches, including a state legislature's decision to allow the adoption of documents prepared under the auspices of NEPA, are, in my view, much more workable and likely to expedite project decisionmaking successfully and without intruding on state prerogatives rather than requiring CEQ, an agency in the Executive Office of the President, to interpret the law, regulations, guidance and case law of states and to make regulatory judgments about them.

I would further note that this section of H.R. 4377 provides for the possibility of a federal agency supplementing a state environmental review document, but only if there are significant new changes or new circumstances. The quality and adequacy of documents vary, whether under federal, state or municipal environmental review procedures, and this construct omits the

⁸ Section 2(d) (2).

very provision in the CEQ regulations giving agencies discretion to supplement a NEPA document for other reasons, such as inadequacy of an analyses for a particular issue. Further, the provision reduces the current review and comment period from 45 to 30 days, a recipe, in complex projects, for inadequate public understanding of and participation in public agency decisions.

The provision for adoption of state documents in this section also appears to circumvent the requirements for adoption of federal documents set forth in the CEQ regulations. As I read the legislation, the only requirements associated with adoption of a state document are that the project sponsor request it and that CEQ would have designated the particular state procedures to be “substantially equivalent” to NEPA. Thus, apparently, the federal agency would have no responsibility for independent review and evaluation, other than determining whether there are new circumstances or new information that would trigger the need to supplement the document, and no requirement for recirculation. 40 C.F.R. §1506.3.

Role of Participating Agencies

“Participating agencies” would be, in many instances, the same as cooperating agencies under existing law; indeed, any participating agency that would be required to adopt a document under this bill would inevitably also be a cooperating agency with jurisdiction by law under the NEPA regulations. However, the intent of the “participating agency” category is to include any agency, at least at the federal or state level. Unlike the CEQ regulations, there are no references to county and tribal governments that “may have an interest in the project”.

Under Section 2(e) (8) of the bill, each participating agency is limited in its comment to those areas where it can point to statutory authority pertaining to the subject of its comments. The lead agency is directed not to act upon, respond to or include in any documents any comment submitted by an agency that it deems to be outside of the authority and expertise of the commenting agency. This is a remarkable direction to the lead agency to put blinders on instead of using common sense and judgment. In my experience, agencies typically do focus on those subject areas within their authority and expertise and they certainly are accorded more deference by the lead agency and by the judiciary for comments reflecting that expertise. However, currently, lead agencies may read and consider other comments, if there are any such comments, just as they read, review and respond to comments from the project proponent, members of the public, communities, county commissioners and other affected parties who do not have statutory authority or academic credentials in a particular discipline. Ironically, this provision puts federal (and possibly state agencies) in a class distinctly behind an individual who has no expertise, let alone authority, on a particular matter but whose comments in their totality require a response from the lead agency.

Any agency that fails to respond to an invitation to be a participating agency within 30 days would be deemed to have declined the invitation and is thus precluded from submitting comments on or “taking any measures to oppose the project; any document prepared under NEPA for that project; and any permit, license, approval related to that project.” The lead

agency is instructed to disregard and not respond to or include in any NEPA document any comment by an agency that has declined an invitation or designation by the lead agency to be a participating agency. It is not clear how the prohibition against an agency “taking any measures to oppose the project” would be interpreted. Federal agencies are already barred from lobbying for or against government action. CEQ’s regulations have a more narrowly circumscribed provision, to deal with the circumstance of an agency declining an invitation to become a cooperating agency. They preclude an agency with jurisdiction by law from declining to be a cooperating agency and permit other agencies to decline degrees of involvement in an action when they are unable to assume particular responsibilities of a cooperating agency. 40 C.F.R. § 1501.

The bill also mandates concurrent reviews by all federal agencies, so that each federal agency must carry out their obligations under applicable law in conjunction with NEPA. On its face, this is similar to the existing provision in the CEQ regulation that, “To the fullest extent possible, agencies shall prepare draft EISs concurrently with and integrated with environmental impact analyses and related surveys [omitting examples and citations] and other environmental review laws and executive orders.” 40 C.F.R. § 1502.25(a). CEQ has worked very hard over many administrations to try to achieve this goal as have several other federal agencies. However, declining agency budgets make this very difficult to achieve and many agencies defer initiation of processes under other laws until the NEPA process is partially and completely concluded, in order to capitalize on the lead agency’s NEPA documentation.

Alternatives Analysis

Section 2(g) of the bill deals with the important issue of alternatives analysis. The analysis of reasonable alternatives to achieve an agency’s purpose and need in moving forward with a proposed action is, by definition, the “heart of the environmental impact statement.” 40 C.F.R. § 1502.14. Without a robust alternatives analysis, this process would simply document the environmental effects of a decision rather than informing the decision. In my experience, by far the most important achievements of the NEPA process have come through alternatives analysis. The requirement in this section to afford an opportunity for involvement by cooperating agencies in determining the range of alternatives to be considered is positive and consistent with current law and guidance.

However, Section (g) (2) on the range of alternatives is confusing and imprudently restricts alternatives. In part, this section states that there is no requirement to evaluate any alternative identified but not carried forward to detailed evaluation in a NEPA document “or other EIS or EA”. That is as factually correct statement so far as it goes under current law, but only to the extent that the lead agency’s decision not to carry an alternative forward for detailed evaluation has a rational basis and is not deemed to be arbitrary and capricious. As a result, the bill’s provision creates confusion about whether it is intended to change current law in some manner. Secondly, this section states that “cooperating agencies shall only be required to evaluate alternatives that the project sponsor could feasibly undertake, including alternatives that can actually be undertaken by the project sponsor, and are technically and economically feasible.” To start with, it is typically the lead agency, not cooperating agencies that evaluate alternatives (as opposed to identifying them). Alternatives must reflect the agency’s purpose and

need and it is already the law that it is the lead agency that determines that purpose and need⁹. However, whatever agency evaluates alternatives for a proposed project, those alternatives should not be restricted to the needs of one particular project proponent only, although the applicant's requirements should certainly be part of the analysis. In the words of CEQ's guidance on this point:

"In determining the scope of alternatives to be considered, the emphasis is on what is 'reasonable' rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Alternatives must be reasonable alternatives, including those that are *practical* or feasible from the technical and economic standpoint and using common sense, rather than simply *desirable* from the standpoint of the applicant." *Forty Most Asked Questions, Id.*, Q. 2a.

The proponent's needs must be considered in shaping the alternatives analysis and the proponent's proposal, of course, usually the proposed action. But agencies are not free under current law to exclude all other considerations. The project proponent is involved with a federal agency in the first place because Congress found a sufficient national interest in funding, regulating or permitting a particular category of activities to mandate a federal role in the proposed action. That national interest – the public's interest – needs to be at the table as agencies and the public identify potential alternatives.

Further, linking alternatives analysis to one particular proponent could undercut the private sector competitive process. In a number of situations, an opportunity for development of a particular type of project is apparent to a number of private sector entities. An agency may receive multiple applications for a transmission line, an energy project, or some other sort of project within roughly the same timeframe. In those circumstances, a lead federal agency must consider the needs and requirements of both the public in the context of national policy and all of the applicants.

Coordination and Schedules for Compliance with Environmental Laws

Section 2(h) of the "Responsibly and Professionally Invigorating Development Act" deals with coordination and scheduling. The first part of this section is similar to but somewhat inconsistent with CEQ's regulations on establishing time limits. CEQ's regulations provide that the agency must set time limits if an applicant requests them and may set time limits of a state or local agency or member of the public requests them, provided that the limits are consistent with the purposes of NEPA and other essential considerations of national policy. 40 C.F.R. 1501.8. H.R. 4377 mandates the development of a schedule for all construction projects. Both the CEQ regulations and the bill set forth factors to be considered in determining time limits, but H.R. 4377 omits several factors identified in the CEQ regulation, among them the degree of public need for the proposed action (including the consequences of delay and the degree to which relevant information is known, and if not known, the time required for obtaining it). H.R. 4377 then caps whatever schedule the lead and participating agencies might develop at no longer than

⁹ See Correspondence between Secretary of Transportation Norman Mineta and CEQ Chairman James Connaughton at <http://www.dot.gov/exccorder/13274/impshed/letters/minetamay6.htm> for a discussion of the roles of lead and cooperating agencies with regard to developing a highway's purpose and need.

two years for a project requiring an EIS or one year for preparation of an EA. Agencies are allowed some flexibility in extending the deadlines but may not extend the deadline for an EIS by more than one year or for an EA by more than 180 days.

These time periods are within the realm of the reasonable in many cases if, importantly, an agency has adequate reasons to implement NEPA and all other environmental laws that may be implicated in a proposed action. However, there are some proposals subject to NEPA of extraordinary complexity or proposals that are affected by events quite outside of the agency's control. For example, some proposals subject to NEPA are affected by complex negotiations between the United States and foreign nations or by changes in Congressional direction. Some proposals may deal with cutting edge science or new information of great import. Some proposals may be significantly changed in the course of environmental review, because of the analysis or outside events. Agencies should not be forced to cut off analysis and public involvement where events outside of their control or the nature of a complex project warrant it. Otherwise decisionmaking will suffer, and in some cases could result in forced denials when full documentation would have facilitated approval.

Congress must consider the implications of this broadly, not just for one particular type of project. For example, this bill would govern the granting of a license for a nuclear power plant. Imagine, for instance, that the NRC has completed the NEPA process for the construction of a new nuclear power plant, or the relicensing of an existing one, and is about at the end of the allowed statutory time, including the one permitted extension. Then a major accident happens somewhere in the world. The Commission is asked to send a team of experts to the site to help with the immediate situation and another team a bit later to help evaluate the causes of the accident. The Commission may rationally wish to wait for a period of time before going forward with decisions on a plant, especially if early indications are that there are technical similarities in the plant that experienced an accident and the plant that is the subject of the imminent NRC decisionmaking. If it felt obliged to comply with the two year timeline, it would be required to make a decision without the information that most Americans would expect and want the NRC to have at its disposal in order to safeguard human health and the human environment from potentially disastrous consequences.

Schedule for Agency Decisionmaking

Section 2(i)(4) restricts all other federal agency decisionmaking related to construction projects. For agencies that are required to "approve, or make a determination or finding regarding a project prior to a record of decision for an EIS or a finding of no significant impact, an agency must make that decision no later than 90 days after the lead agency publishes a notice of availability of a final EIS or issuance of other final environmental documents "or no later than such other date that is otherwise required by law, whichever comes first." The bill goes on to provide that "notwithstanding any other provision of law", an agency must make a final decision on whether to approve a proposed project within 180 days after the execution of a record of decision or finding of no significant impact, unless mutual agreement is reached with "the federal agency, lead agency and the project sponsor" or when extended for good cause by a federal agency for no longer than one year.

The wording in this section is puzzling because if an agency has broad approval authority over a project (as opposed to making a determination or finding) it should already be the lead or joint lead agency and would be issuing a Record of Decision or other decision document¹⁰. If an agency is a cooperating agency because it has jurisdiction by law to issue a required permit associated with a project that requires an EIS, that cooperating agency will also sign a Record of Decision or, in the case of a project covered by an EA, another decision document.

To the extent that the provision's intent is to cover lead agencies, it impinges on the authority of agencies under countless non-environmental laws and arguably is incompatible with the constitutional authority of the President to manage the executive branch. There are a number of factors affecting decisionmaking that are outside of an agency's control. For example, the past few Presidents, both Republican and Democrat, coming into office have put a hold on entire categories of actions, including some requiring compliance with NEPA, so that they can evaluate the work of their predecessor and give their own direction. Foreign policy and/or national security concerns may affect some proposed decisions. Further, NEPA does not capture the entire universe of considerations regarding a federal agency's decision; indeed, that is precisely why the record of decision is not defined in the CEQ regulations as an environmental document. Considerations having nothing to do with environmental impacts and not analyzed in an EIS or EA or under other environmental laws often lawfully guide the final agency decision. Under this provision, an agency decisionmaker is faced with either disapproving a project or approving it under circumstances that may be arbitrary and capricious.

If a federal agency does not act upon a project within these timeframes, the project "shall be deemed approved by such agency and such agency shall issue any required permit or make any required finding or determination authorizing the project to proceed within 30 days" of the deadlines set forth in this act. That automatic approval is then shielded from judicial review.

To the extent that this section is not meant to refer to federal agencies that are signing a Record of Decision or other decision document but rather refers to other federal agencies that have legal responsibilities for making determinations or findings, the section is still confusing. Most findings or determinations do not "authorize" the project to proceed; in the environmental context, they provide information about the impacts of proceeding that have legal consequences but are not the kind of go/no go decision that a permit or license represents. Possibly the result would be for such agencies to issue a finding or determination reflecting the administrative record to date and then conclude that this section requires them to issue that record.

¹⁰ Note that while a federal agency may choose to combine a decision document with a Finding of No Significant Impact (FONSI), a FONSI by itself is not a decision document on a project, but rather a finding as to the level of environmental impacts anticipated by the agency. Agencies may and usually do issue a separate decision document based on the underlying statutory authority that authorizes whatever permit or license has been requested.

Issue Identification and Dispute Resolution

Section 2(j) deals with issue identification and resolution of disputes, two other important topics within the context of environmental review. Agencies are directed to work cooperatively to identify resolve issues that could delay completion or environmental review. This direction is consistent with the entire thrust of the NEPA process. But the provision goes on to direct agencies to resolve issues that could result in the denial of any approval required for a project. It provides the outlines of a dispute resolution process that would culminate in notification of a dispute to heads of participating agencies, the project sponsor and CEQ “for further proceedings in accordance with Section 204 of NEPA.”

A troubling aspect of these provisions is the language used that suggests that the only acceptable outcome of the NEPA process and other environmental laws is approval of a project. In fact, for prudential reasons agencies are required to analyze the “no action” alternative and rarely, but sometimes, choose that alternative. It is appropriate to seek resolution of disputes about the analysis and the process but it is inappropriate to tilt the decisionmaking process across the board in favor of wholesale approval. Not every proposed project is of equal value and worth and sometimes it is the role of government to say no, not least when federal funding or other public resources are squarely implicated.

Judicial Review

Finally, the bill would enact two provisions related to judicial review. The first provision, “notwithstanding any other provision of law” barring a claim arising under Federal law related to a permit, license or approval by a Federal agency unless the plaintiff “submitted a comment during the NEPA process on the issue on which the party seeks judicial review and the comment was sufficiently detailed to put the lead agency on notice of the issue” overstates current law related to NEPA claims and would also apply, as written, to all claims under any federal law, whether related to environmental laws or any other law. In NEPA cases, the Supreme Court has already made it very clear since 1978 that, “While NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors’ position and contentions. . . . The comment cannot merely state that a particular mistake was made . . . ; it must show why the mistake was of possible significance in the results. . . .”, *Vermont Yankee Nuclear Power Corp v. NRDC*, 435 U.S. 519 (1978). That holding has been reiterated numerous times federal courts and is well settled NEPA law. Indeed, some agencies, such as the Forest Service, regularly include the following admonition in all of their draft EISs:

“Reviewers should provide the Forest Service with their comments during the review period of the DEIS. This will enable the Forest Service to analyze and respond to the comments at one time and to use information acquired in the preparation of the final environmental impact statement, thus avoiding undue delay in the decision making process. Reviewers have an obligation to structure their participation in the National Environmental Policy Act process so that it is meaningful and alerts the agency to the reviewers’ position and contentions [citing *Vermont Yankee, Id.*]. Environmental

objections that could have been raised at the draft stage may be waived if not raised until after completion of the FEIS (*City of Angoon v. Hodel* (9th Circuit, 1986) and *Wisconsin Heritages, Inc. v. Harris*, 490 F. Supp. 1334 1338 (E.D. Wis. 1980). Comments on the DEIS should be specific and should address the adequacy of the statement and the merits of the alternatives discussed (40 Code of Federal Regulations 1503.3)."

However, while the Supreme Court has been quite adamant about this rule, it also stated that the primary burden of compliance with NEPA falls on federal agencies and that and "an EA's or an EIS' flaws might be so obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." *Department of Transportation v. Public Citizen*, 541 U.S. 752, 765 (2004). This ensures that agencies are not tempted to shirk their statutory responsibilities, producing shoddy or grossly inadequate draft analysis and correcting it only if members of the public can find the time to uncover and identify the deficiencies. The reach of this provision to all other laws, including laws that trigger requirements not included under the purview of NEPA, including laws that do not even have an opportunity for public comment, is extremely troubling.

Second, the bill institutes a 180 day statute of limitations for claims arising under federal law challenging a permit, license of approval, unless a shorter time is specified in underlying law. Again, the reach of this provision sweeps across dozens of statutes, some of which include mandated notice requirements prior to filing judicial review and/or administrative appeals processes that must be exhausted prior to seeking judicial review. It also extends to independent regulatory agencies, such as the Nuclear Regulatory Commission, that have formal administrative proceedings with particular time periods that would apparently be swept aside by this provision. In short, it overrides dozens of established agency procedures, appeal processes, and the exhaustion of administrative remedy doctrine and would leave many agencies such as the Nuclear Regulatory Commission, the Federal Energy Regulatory Commission, the Bureau of Land Management and other agencies faced with revamping their own processes in accordance with their authorizing statutes and current administrative processes.¹¹ Among the troubling consequences of such a provision are the potential to force members of the public into court precipitously, to preserve their rights before they know whether there is any real need for litigation.

Conclusion

In summary, this bill raises a number of serious concerns. It would:

- Promote or mandate project approvals regardless of the public interest;
- Create confusion, delay and litigation caused by unclear statutory language and conflicts with numerous environmental and non-environmental laws
- Turn over government functions to private entities with inherent conflicts of interests

¹¹ While there is a 180 day statute of limitations for NEPA claims under the Safe, Accountable, Flexible, Efficient Transportation Equity Act, the current transportation authorization act, that provision, tailored to the federal and state highway processes, does not pose the same problems that this approach would for many other agencies. For one thing, there is no administrative appeals process in the context of highway construction.

- Impose “one size fits all” solutions that don’t address the cause of the issue being “solved”.

I hope that these comments are of assistance to the Subcommittee, and would be pleased to answer any questions that the Subcommittee may have on the subject of H.R. 4377.

Mr. BACHUS. Thank you. And for the record, you had attached Ms. Bear's statement.

Mr. SLESINGER. Yes.

Mr. BACHUS. But it does not identify her as who the statement is from. So I am going to, for the record, this is a statement attached to your testimony as Ms. Dinah Bear.

Mr. SLESINGER. Thank you, Mr. Chairman.

Mr. BACHUS. Thank you.

Now, at this time, Mr. Ivanoff, you are recognized.

TESTIMONY OF NICK IVANOFF, PRESIDENT & CEO, AMMANN & WHITNEY, ON BEHALF OF AMERICAN ROAD & TRANSPORTATION BUILDERS ASSOCIATION (ARTBA)

Mr. IVANOFF. Thank you.

Chairman Bachus, Representative Cohen, Members of the Subcommittee, I am Nick Ivanoff, President of Amman & Whitney out of New York. I am here today on behalf of the American Road & Transportation Builders Association where I currently serve as First Vice Chairman.

ARTBA, now in its 111th year of service, represents all sectors of the U.S. transportation construction industry, which sustains more than 3.3 million American jobs. Our industry directly navigates the Federal regulatory process to deliver new transportation projects and improvements to existing infrastructure. As such, we have firsthand knowledge about specific regulatory review processes and burdens that can and should be alleviated.

Every reauthorization of the surface transportation program since 1998 has featured reforms to the transportation project review and approval process as a major bipartisan objective. These measures provide valuable insight into the successes and failures of legislative efforts to reduce delay in the delivery of needed transportation projects without sacrificing regulatory safeguards.

Today's hearing focuses on the RAPID Act, which seeks to take some of the reforms from recent surface transportation bills and expand their use to other areas of Federal responsibility. According to a report by the U.S. Government Accountability Office, prior to the enactment of MAP-21, it took as many as 200 major steps and 19 years to deliver a new, major federally funded highway project. These delays are not only an inefficient use of Federal resources, but also deny the American people mobility and safety enhancements and stifle job growth and economic expansion.

Reducing the amount of time it takes to deliver transportation improvements was first addressed in the 1998 TEA-21 bill. This legislation concentrated on establishing concurrent, as opposed to sequential, project reviews by different Federal agencies. While this improvement was a step in the right direction, it had limited impact as concurrent reviews were discretionary rather than mandatory.

The 2005 SAFETEA-LU saw the introduction of lead agency status for the U.S. Department of Transportation on project reviews. Lead agency is an important mechanism for improving the project delivery process as it gave DOT a means to request action by non-transportation agencies. The measure also included limitation on when lawsuits can be filed against projects. The combination of

these two reforms created new levels of predictability for project review schedules and provided opportunities to shorten the approval process for needed transportation improvements.

There is, however, a clear lesson from 1998 and 2005. Simply giving Federal agencies the ability to complete regulatory reviews in a more efficient manner in no way guarantees that authority would be utilized. For this reason, subsequent reform efforts focused on not just providing additional tools to reduce delay but also creating mechanisms to ensure or at least encourage the use of those tools.

Last year's MAP-21 took project delivery reform even further. In addition to building upon the concept of lead agency, MAP-21 also includes specific mandatory deadlines for permitting decisions with financial penalties for agencies that do not meet those deadlines. In addition, MAP-21 creates multiple new classes of categorical exclusions, allowing projects with minimal environmental impacts to avoid unnecessary multiyear reviews.

While MAP-21 represents an unprecedented and comprehensive approach to reforming the transportation project delivery process, that does not mean ARTBA will stop looking to further reform and ensure that transportation improvements are advanced as efficiently as possible. Reforming the environmental review process for transportation projects has been a 15-year evolution that has provided important lessons about what works and what does not work in this area.

Mr. Chairman, Representative Cohen, ARTBA appreciates the opportunity to be part of today's discussion and we certainly look forward to answering any of your questions. Thank you very much.

[The prepared statement of Mr. Ivanoff follows:]



Testimony of

**Mr. Nick Ivanoff
President & CEO
Ammann & Whitney**

**On Behalf of the
American Road and Transportation Builders
Association**

**Submitted to the
United States House of Representatives
Committee on the Judiciary
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law**

**Hearing on the Responsibly and Professionally Invigorating
Development Act of 2013**

July 11, 2013

Chairman Bachus and Ranking Member Cohen, thank you for holding this hearing on the Responsibly and Professionally Invigorating Development (RAPID) Act of 2013. My name is Nick Ivanoff. I am currently president & CEO of Ammann & Whitney in New York, NY. I also serve as the first vice chairman of the American Road and Transportation Builders Association (ARTBA) and am appearing before you today in that capacity.

ARTBA, now in its 111th year of service, provides federal representation for more than 5,000 members from all sectors of the U.S. transportation construction industry. ARTBA's membership includes private firms and organizations, as well as public agencies that own, plan, design, supply and construct transportation projects throughout the country. Our industry generates more than \$380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs.

ARTBA members must directly navigate the regulatory process to deliver transportation improvements. As such, they have first-hand knowledge about specific federal burdens that can and should be alleviated.

Significant progress was made on a bipartisan basis to streamline the permitting and approval process for transportation improvements in the past three reauthorizations of the federal surface transportation program: the Transportation Equity Act for the 21st Century (TEA-21) of 1998; the Safe, Accountable, Flexible Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) of 2005; and the Moving Ahead for Progress in the 21st Century (MAP-21) Act of 2012. Each of these measures provides valuable insight about the successes and failures of legislative efforts to reduce delay in the delivery of needed transportation projects without sacrificing regulatory safeguards.

ARTBA recognizes that regulations play a vital role in protecting the public interest in the transportation review and approval process. They provide a sense of predictability and ensure a balance between meeting our nation's transportation needs and protecting vital natural resources. These goals, however, do not have to be in conflict. The most successful transportation streamlining provisions have been process oriented and essentially found a path for regulatory requirements to be fulfilled in a smarter and more efficient manner.

Today's hearing focuses on the RAPID Act, legislation which seeks to take some of the bipartisan mechanisms from TEA-21, SAFETEA-LU and MAP-21 surface transportation bills and expand their use to other areas of federal responsibility. As a champion of many of these project delivery reforms, ARTBA can state first-hand that these reforms have begun, and should continue, to reduce delays in the transportation project delivery review and approval process.

According to a report by the U.S. Government Accountability Office (GAO) prior to the enactment of MAP-21, as many as 200 major steps are involved in developing a transportation project, from the identification of the project need to the start of construction. The same report also shows it typically takes between nine and 19 years to plan, gain approval of, and construct a new major federally-funded highway project. This process involves dozens of overlapping state and federal laws, including: the National Environmental Policy Act (NEPA); state NEPA equivalents; wetland permits; endangered species implementation; and clean air conformity.

Both parties recognized that this is simply too long to make the public wait for transportation projects that improve mobility and safety. As such, finding meaningful ways to expedite this process has been a congressional priority for 15 years.

Reducing Project Delay

Reducing the amount of time it takes to build transportation improvements was first addressed in 1998 with the passage of TEA-21. Efforts to reduce delay in this legislation concentrated on establishing concurrent project reviews by different federal agencies. The concept was that multiple reviews done at the same time, as opposed to one after the other, would reduce the amount of overall time it took to get a project approved. While this improvement was a step in the right direction, it had limited impact, as concurrent reviews were discretionary, rather than

mandatory. Thus, it was up to the federal agencies involved in a project whether or not to take advantage of this new benefit.

In 2005, SAFETEA-LU sought to further reform the project delivery process by establishing a wider range of new ways to deliver transportation improvements. Specifically, SAFETEA-LU gave greater authority to the U.S. Department of Transportation (DOT) as “lead agency” during the delivery process, limited the window during which lawsuits could be filed against projects and reformed the process for determining impacts on historical sites and wildlife refuges.

SAFETEA-LU represented a far more expansive reforming of the project delivery process, by addressing the schedule for project reviews and also factors outside of the process itself which contribute to delay. SAFETEA-LU also went further than TEA-21 in that some of its reforms, such as the limitation on lawsuits, were mandatory, as opposed to optional.

The clear lesson between the 1998 and 2005 surface transportation bills was that simply giving federal agencies the ability to complete regulatory reviews in a more efficient manner in no way guarantees that authority would be utilized. As such, SAFETEA-LU took more aggressive steps to influence non-transportation agencies into making transportation project reviews a higher priority.

While SAFETEA-LU’s environmental streamlining provisions were a significant step forward from those enacted in TEA-21, the transportation project delivery process remained at an unacceptable pace. As such, MAP-21 has taken project delivery reform even further, with more tools for reducing delay. In addition to building upon the concept of “lead agency” begun in SAFETEA-LU, MAP-21 also includes specific deadlines for permitting decisions as well as a scheduling mechanism to ensure environmental impact statements (EISs) do not take longer than four years. As with SAFETEA-LU, however, it is important to note that many of the reforms made in MAP-21 are discretionary. ARTBA will be closely watching the degree to which states and federal agencies utilize this enhanced authority over the coming years.

Greater Strength for “Lead Agencies”

One of the primary areas the RAPID Act seeks to replicate from SAFETEA-LU and MAP-21 is the granting of increased authority to “lead agencies.”

SAFETEA-LU established DOT as the “lead agency” for the environmental review of transportation projects, including “purpose and need” and “range of alternatives” determinations. MAP-21 expanded upon this authority by allowing DOT, as the lead agency for all transportation projects, to name a single modal administration as the lead agency in the case of multi-modal projects. The secretary of transportation also may, within 30 days of the closing of the comment period for a draft EIS, convene a meeting of the lead agency, participating agencies and project sponsor to set a schedule for meeting project deadlines. This new authority allows DOT to be the focal point of the review process as opposed to a peer on equal footing with non-transportation agencies.

The opportunities to reduce the delay caused by inter-agency conflict provided by SAFETEA-LU and MAP-21 in the area of lead agency are significant. However, these reforms will only be

effective to the degree that DOT chooses to take advantage of them. In other words, it is not mandatory that DOT take advantage of any of the benefits of “lead agency” status.

Even as an optional tool, though, “lead agency” status is an important mechanism for improving the project delivery process. By allowing other federal agencies to avail themselves of “lead agency” authority, the RAPID Act would help create a process to reduce delay in project delivery by giving agencies of primary jurisdiction for a project more control over the process itself.

Deadlines on Agency Decisions and Limitations on Filing of Lawsuits

The RAPID Act also seeks to improve project delivery by limiting the time during which lawsuits may be filed against projects. This concept was part of both SAFETEA-LU and MAP-21. SAFETEA-LU set a deadline of 180 days after the issuance of a federal decision on a project for the filing of a lawsuit. MAP-21 shortened this deadline to 150 days. Establishing a firm deadline for lawsuits ensures that any possible litigation is dealt with at the beginning of the delivery process. By addressing conflicts at the start of the delivery process, planners then are able to set schedules without fear of litigation after the deadlines have passed. Further, the deadline allows conflicts to be heard and resolved sooner, rather than later. By extending this provision to non-transportation projects, the RAPID Act takes similar steps to improve project delivery, ensuring that claims worthy of litigation are heard swiftly while at the same time preventing project opponents from using litigation as a tool to endlessly hold-up necessary development.

The RAPID Act also seeks to establish specific deadlines for environmental review documents, including a two-year deadline for EISs and a one-year deadline for environmental assessments (EAs). This would go further than MAP-21. Under MAP-21, project sponsors may request the secretary of transportation to set an expedited schedule for projects undergoing an EIS for more than two years. This schedule would ensure the project’s EIS would be completed within two additional years. The RAPID Act’s mandatory deadline could provide a greater sense of certainty during the delivery process, as it would be the same for every project.

However, MAP-21 does establish new deadlines not included in the RAPID Act for permitting decisions from federal agencies. If these deadlines are not met, the agencies suffer financial penalties. Thus, for these permitting decisions, MAP-21 has a financial incentive for compliance that the RAPID Act does not. It should be noted, however, that this provision of MAP-21 has not yet been put into effect and it remains to be seen how it will work in practice.

Simplification of the EIS Process and Reduction of Duplicative Work

The RAPID Act also shares MAP-21’s goal of reducing the amount of duplicative work in the review and approval process. The RAPID Act would allow for state-level environmental review documents to be used during the federal approval process to avoid duplication of work. MAP-21 similarly allows for the option of using materials in the transportation planning process during NEPA review. Both provisions attempt to reduce delay by allowing, where appropriate, the use of material already created instead of “reinventing the wheel.” MAP-21 also encourages the use

of programmatic agreements, spelling out requirements in the beginning of the review and approval process, rather than over a longer period of time. By outlining requirements early in the process, programmatic agreements provide a chance to give transportation planners increased certainty throughout the overall review process.

MAP-21 also simplifies the EIS process, by allowing a lead agency to simply list the corrections between a draft EIS and a final EIS—as opposed to producing an entirely new document. Also, lead agencies, to the maximum extent possible, are directed to combine final EISs and records of decision into a single document. By preventing the needless production of multiple additional documents, MAP-21 significantly reduces the amount of time involved in EISs. Both of these provisions should be considered for inclusion in the RAPID Act.

Delegation of Environmental Review Responsibilities

Under SAFETEA-LU, a pilot program was established allowing five states (Calif., Alaska, Ohio, Texas and Oklahoma) to assume the role of the federal government during the NEPA process. MAP-21 expands the opportunity to participate in the program to all states. States choosing to take part would conduct their own environmental reviews, potentially saving time as a result of not having to go through multiple federal agencies.

Of the five states allowed to participate in the delegation pilot program under SAFETEA-LU, only California chose to do so. While the reason for non-participation thus far by the other states has varied, potential liability and litigation costs were an overriding issue, as the state would also be assuming federal responsibilities for litigation over any project where delegation was used. Still, ARTBA believes delegation of environmental review responsibilities to states could be an important tool to save resources and speed project delivery without sacrificing regulatory safeguards. As such, the subcommittee should explore how delegating federal authority for project reviews to states could be incorporated into the RAPID Act.

Expansion of the Use of Categorical Exclusions (CEs)

Although not addressed by the RAPID Act, one of the most significant changes to existing law in MAP-21 is an expansion of the use of CEs during the environmental review process. A CE is used when projects create minimal impacts on the environment. The difference between a CE and an EA or EIS is multiple years added on to the amount of time it takes to complete a project review. Under MAP-21, many sorts of routine projects are now automatically classified as CEs, these include rehabilitation and repair projects, projects within an existing right-of-way, projects with minimal federal resources and projects undertaken as a result of an emergency situation. Expanding the use of CEs to these additional areas should enable local governments to have more certainty as to when a CE can be used and also allow routine projects to be undertaken without burdensome, unnecessary levels of review.

MAP-21 also calls for the development of CE guidelines for projects being constructed in response to an emergency or natural disaster. To qualify for CE status, such a project must be of the same mode/type and in the same right-of-way as the facility it is replacing and started within two years after the emergency/natural disaster. It should be noted that MAP-21 also offers states additional flexibility in emergency situations by allowing the issuance of special permits to

overweight vehicles delivering relief supplies and allows states to use any federal highway program apportionments other than those dedicated for local governments to replace transportation facilities damaged by a national emergency.

NEPA was never meant to be a statute enabling delay, but rather a vehicle to promote balance. While the centerpiece of such a balancing is the environmental impacts of a project, other factors must be considered as well, such as the economic, safety, and mobility needs of the affected area and how a project or any identified alternative will affect those needs. Allowing certain types of projects to be classified as CEs is a very effective way of reducing delay in the review and approval process, ensuring that projects with minimal environmental impacts are not put through a needlessly long regulatory process. ARTBA suggests the members of the subcommittee examine a greater use of CEs as an additional way to further the goals of the RAPID Act.

Conclusion

The transportation sector has made significant strides in the area of project delivery. Beginning with TEA-21 and continuing through both SAFETEA-LU and MAP-21, members of both parties have worked together to ensure our nation's infrastructure continues to improve at a pace matching the growth of our country. While MAP-21 represents an unprecedented and comprehensive approach to reforming the transportation project delivery process, that does not mean ARTBA will stop looking for further reforms to ensure transportation improvements are advanced as efficiently as possible. The first step in this effort must be to ensure MAP-21 project delivery reforms are implemented in a timely manner that is consistent with the letter and spirit of the new law.

Reforming the environmental review process for transportation projects has been a 15-year evolution that has provided important lessons about what works and what does not work in this area. We commend the authors of the RAPID Act for attempting to use these lessons as a guide for how similar reforms should be structured in other federal areas of responsibility.

Chairman Bachus, Representative Cohen, thank you for allowing me to appear before you today to discuss ARTBA's long history of promoting common sense reforms in the transportation project delivery process. We stand ready to assist the subcommittee as it works to bring comparable reforms to other federal agencies.

I would be happy to answer any questions from you or other members of the subcommittee.

Mr. BACHUS. Thank you very much, Mr. Ivanoff.

At this time, I am going to recognize the sponsor of this legislation for questions, the gentleman from Pennsylvania, Mr. Marino.

Mr. MARINO. Thank you, Chairman.

And again, good morning, gentlemen.

Mr. Slesinger, I would like to begin with you, please. In March last year, the President issued an executive order directing agencies to, quote, ramp up efforts to improve the Federal permitting process by, among other things, reducing the amount of time required to make permitting and review decisions. And more recently on May 17 of this year, the White House press release, streamlining the process will mean the U.S. can start construction sooner, create jobs earlier, and fix our Nation's infrastructure faster.

Do you agree with the President's proposal here?

Mr. SLESINGER. I think the President's proposal went forward. I think because of his statement and other things, more people, more staff were working on some of these reports that made them done faster, which is important.

Mr. MARINO. But we have seen no results yet of that. We have seen no job increases because of this.

Mr. SLESINGER. I do not think that is the case.

Mr. MARINO. I do think it is the case. It is the jobs. This is an Administration that says jobs are the issue.

And the red tape that I see taking place—you have worked in Government your entire life. You have a distinguished career. I was in industry for 13 years in factories working, building them, started there sweeping the floors until I put myself through college and law school. I saw what red tape does to jobs, infrastructure. When people come in with a little authority, a bureaucrat, and ask—we are going to shut you down for this reason. Why? It is not logical. And the response is because I have the power. I can.

When roofers in my district—OSHA comes through and a young person just out of college sites them and shuts them down and said what did we do. Well, our instruction is to find as many construction crews as possible.

When I hear of delays from 7 to 10 to 12 years before permitting can be put through for sewer systems and water systems, and you think that is efficient? You said that this legislation is not efficient. Well, I can assure you when this legislation is passed, it will submit these permits, approve them, done in the proper manner a lot faster than 7 and 9 and 10 years.

Mr. SLESINGER. I think the reports the GAO has recently done has shown, for instance, that wind and solar permitting has been shortened by about 40 percent in its permitting.

But I think you will find that if you check in Pennsylvania, if you go to the Chamber Web site of Project No Project, you will see most of the delays in Pennsylvania are not NEPA. It is permitting. It is zoning restrictions. It is opposition that is separate from the Federal NEPA process.

Mr. MARINO. I understand what you are saying there, sir. I understand what you are saying. But don't you think it is logical to have an entity, a gatekeeper keep the bureaucratic system, whether it is in the Federal, State, or local government, on a timetable instead of one entity who has nothing to do with another entity

says that I do not like the report from that agency, so I am stopping it and we go back to zero.

What is wrong with having an entity say, okay, agency, you have this amount of time? If you have any issues, get to work on it. And with bureaucrats that I have seen—I was a prosecutor for 18 years. I saw it in all forms of government. It is just blatant here in D.C. where the bureaucrat will say I will get to it when I get to it. If they had to work on an assembly line, they would be out of a job.

Mr. SLESINGER. Under the current CEQ regulations, project sponsors are able to ask for and get timelines, and in 25 years of those regulations, I do not believe there is any case where the timeline was not agreed to by CEQ usually along what the project sponsor wants. But the key again, as you will see when you look at the cases in the Chamber Web site, it is other issues. It is the financing. It is the local opposition and zoning and the local politicians for various reasons—

Mr. MARINO. Well, then that should be part of an overall gatekeeping process. You say that a lot of it is because of sequestration. I am really tired of hearing about the sequestration because we have seen what a farce it is so far. And let me give you an example of that in my building, right in the Cannon Building where they are locking doors and they cannot have guards there. Where they normally have two, well, they locked half the doors. Now there are four guards at an exit.

So, come on. Let's call it what it is. We have a situation where things move at a glacial pace. And I hear from my constituents constantly that if we could just eliminate this red tape, if we could just eliminate all the agencies that duplicate the services and really have no experience out in the field.

So you are saying you do not agree that we can make this more efficient and more effective?

Mr. SLESINGER. We can make it more efficient. We can make it more effective. But to really do that, we are going to have to change the federalist system and give a gatekeeper—

Mr. MARINO. That is the first thing we agree with, sir. Change the Federal system. And you know something? You are a very intelligent man. I respect your credentials, and I think you have a lot to offer here. And I am extending my hand, as I do to my friend on the other side of the aisle. Give me some suggestions. Let's talk about how we improve efficiency. If we improve efficiency, it is going to create jobs. We create jobs. It is going to get us out of this \$17 trillion of debt. Do you agree with me, sir?

Mr. SLESINGER. I think we can. I think, though, we must remember particularly in NEPA, as Mr. Ivanoff has said, we have been making changes every single year. Let's see how those work before we now duplicate, as unfortunately your bill does—

Mr. MARINO. Duplicate? You are telling me about duplication. I would love you to come in my office and see the stacks of information and regulatory agencies and laws that are not only duplicated but triplicated and 14 other different ways. The left hand does not know what the right hand is doing.

And the people that are out in the field making these decisions—they do not have the experience, and they do not know what it is like to create a job and they do not know what it is like until it

affects them personally when they decide to get out of the government work and get into private enterprise. And I have a couple of friends that have done that, and they will say to me, you know something, Tom, a couple years ago you and I did not agree when I was with the government at a State level. But now I am with industry and I see the problem. Let's work on that.

Mr. SLESINGER. I would just point out if your bill passed and Mr. Ivanoff tried to do an EIS, he would have three conflicting laws to have to look at: NEPA under the APA, NEPA under the regular National Environmental Policy Act, and the requirements now under MAP-21.

Mr. MARINO. Well, then let's focus on how to deal with that issue as well. I do not know it all. I will be the first one to admit that. But this is a beginning, and we have to start doing something now. This country cannot afford to continue to have roadblocks and obstacles put up by people who, number one, do not know what they are doing, people in the bureaucracy who really do not know what it is like to put a 40- or 50-hour week in a factory and they have no ideas of what it is like to be an entrepreneur to go out and create jobs that are blocked because of unreasonable red tape and inefficient and inexperienced people.

I do not know what my time is now, but I am pretty sure I am over it. So I look forward, sir, to working with you and taking advantage of your talent and experience, along with anyone else and certainly Mr. Cohen, my friend on the other side. So I thank you. I yield back.

Mr. GOODLATTE [presiding]. We thank the gentleman.

The Chair now recognizes the gentleman from Tennessee, Mr. Cohen, for his questions.

Mr. COHEN. Thank you, Mr. Chair.

And Mr. Marino, my home is on 10 acres, but within 10 acres, very close, I have bear also. I live right near the zoo. [Laughter.]

Well, mine come up on the porch, and they are fat and they are healthy.

Mr. COHEN. I used to have dreams, when I was a child, about that, but it never happened thankfully.

Mr. Slesinger, do you and Mr. Kovacs ever talk? Do you and Mr. Kovacs—do you all talk?

Mr. SLESINGER. We did before when I worked at the Environmental Technology Council and I represented an industry association.

Mr. COHEN. Mr. Kovacs, do you think it would be a good idea if you all talked and maybe found some—I would love to have common ground where Mr. Marino and I could get something and we could make our economy—

Mr. KOVACS. I would be very appreciative to talk to Scott, very appreciative.

Mr. COHEN. Are there places you think that you and he could agree to a way to speed up the process?

Mr. KOVACS. I am sure there are and I hope there are.

The one thing I would like to just reassure you and Mr. Slesinger—nothing in this bill—this bill is strictly procedural. Nothing affects the underlying substance of NEPA at all. And I think that is one of the confusions that has been here. I think the

Committee—whoever drafted the bill for the Committee did a very good job of staying out of the substance. And the point of having multiple agencies involved, in other words, a three-tier type system—that is exactly—I mean, to be very honest with you, that is exactly what is starting to move forward with, for example, SAFETEA-LU and MAP-21 and, frankly, even in the Recovery Act. So the Committee has a chance to really put a timeline around the package, and I think it would be really well served if you can do that.

Mr. COHEN. Mr. Slesinger, do you agree with that?

Mr. SLESINGER. No. I think there needs to be flexibility for the timelines. If you are doing a highway project that is similar to a lot of other highway projects, there is a good history to know how long it should take and those timelines can be agreed to. But when there is unique projects, such as Cape Wind turned out to be, if it is a nuclear power plant licensing where the timelines are somewhat longer, it may be inappropriate to set up a very fixed timeline. For instance, nuclear power plants—a lot of the processes were stopped when Fukushima happened and people had to go back to see what we could learn to make sure we do it right. So we just need some flexibility.

Mr. COHEN. Let me ask you this. Mr. Duffy talked about a Massachusetts law. Are you familiar with the Massachusetts law that has a 12-month limit?

Mr. SLESINGER. No, I do not. I am sorry.

Mr. COHEN. Mr. Duffy, do you think that that Massachusetts law is necessarily something that could be—is it apples to apples or is it something different?

Mr. DUFFY. I think it is very close. That is why I brought it forth as an example for consideration. As a matter of fact, it was introduced in the early 1970's largely in response to localized oppositions to power plants, in particular nuclear power plants. And the decision was made that the ultimate policy decision should be made on a comprehensive basis on a statewide basis rather than multiple decisions by numerous agencies at the local, municipal, and State agency, but also recognition that projects needed to move forward led to the provision of the 12-month limit, as well as a direct appeal to the State's highest court so that projects could move forward more quickly. And I think that was a bipartisan bill. It has got 30 years of experience in Massachusetts, and it has withstood the test of time. That is why I thought it was an excellent example for Congress to consider.

Mr. COHEN. I would hope that we could find a way to do it. I think what Mr. Slesinger talks about—the lack of money sometimes is a problem. Mr. Kovacs and Mr. Duffy, do you not agree that sometimes lack of funding is the cause for the delay?

Mr. DUFFY. It can certainly be a factor.

Mr. COHEN. Mr. Kovacs, do you agree?

Mr. KOVACS. Well, the projects that we looked at, you have to appreciate, were all private sector and the money was there. And in Project No Project, for example, out of the 351 projects, the private sector said it was willing to invest \$571 billion. And in the highway funds, we have always supported additional funding for the infrastructure. On the Government side, we have supported the money,

and on the private side it is there. So I do not think it is really money.

Mr. COHEN. Mr. Slesinger?

Mr. SLESINGER. Part of it is money. Part of it is just experience. I will give an example. The Bureau of Land Management used to take 4 years to do an analysis for putting wind or solar on our public lands. With more staffing and more experience, the time now is just slightly over 1 year. So when we get more experience, we get more staffing, the agencies can do their job much quicker and efficiently.

Mr. COHEN. Since my time has expired, I will yield back the balance of it.

Mr. GOODLATTE. I thank the gentleman.

And the Committee will stand in recess. It may be a very brief recess because the Chairman of the Subcommittee I believe is on his way back from the vote, and he will ask his questions as soon as he returns. But the rest of the Members will recess now so we can go handle a vote on the floor.

[Recess.]

Mr. BACHUS. We are back from our recess. We will give everybody a minute or so to reassemble. I am not sure. I think we do have some other Members coming. I anticipate maybe two other Members who would like to ask questions.

Let me say before I initiate my questions I think we all have these experiences we go through, and it is fascinating, Mr. Duffy, the experience your company has had. Amazing. And also amazing that Massachusetts has a short statute. It proves that you can do things deliberately and yet thoroughly and in a short period of time.

Mr. DUFFY. And I would add, Mr. Chairman, as you noted in your opening statement, the initial guidance from the CEQ from 1981, the famous 40 questions—on the very specific question, what is the timeline required for a NEPA process, their guidance at that time was the council has advised the agencies under the new NEPA regulations, even large, complex energy projects would require only about 12 months for the completion of the entire EIS process. So that was in 1981, roughly contemporaneous with the adoption of the Massachusetts statutes. They were both focused on a 12-month review at that instance. And somewhere between 1981 and today, we have had a wide expansion, obviously. And I think it may be useful for the agencies to get a more clear statement of congressional intent as to how long this process—

Mr. BACHUS. That is a very good point.

Mr. Slesinger, you refer to those 40 questions in your testimony.

Mr. SLESINGER. Well, I think the one thing that we have to be aware of with timelines and in this bill in particular is that a project sponsor can require an agency to start working on the EIS process, but the agency may not be funding that construction for 10 or 15 years. That is a big problem with the Corps of Engineers where they may begin EIS's, but they know the funding is 15 or 20 years out. So there is a tendency in agencies like that not to move that EIS process along quicker. So maybe we need to make sure that if we are going to do the EIS process, there is going to be funding, be it private or public, to make the timeline make

sense. You do not want to do an EIS so far before the beginning of construction that you are going to learn things that will be important. For instance, it would be silly to do storm protection on Long Island or Staten Island 5 years ago, then have Sandy come and find out that you learned so much you really need to go back and do the whole thing. So if we can time the EIS closer to when construction or whatever is going to happen, I think it would make agencies not maybe take a lot of time—

Mr. BACHUS. Well, of course, I think that would almost argue for a streamlined process because many times we do have an environmental impact and then there are court appeals and things are tied up for 10 years or 8 years and then we are told we have to update all those engineering studies. And that feeds back in to more delay.

Now, I went to India several years ago, and they took me out to a house on a road. It was a four-lane highway. And in the middle of the highway, all of a sudden it narrowed to one lane, and there was a two-story house in the middle of what would have been the road. And they explained that Nehru was so concerned because he was persecuted by the British that he established a long administrative appeal process where you could appeal, appeal, appeal, meant to protect his civil liberties. But in ensuring all that, it can take up to 50 years in India to condemn a piece of property. So I said, well, this one piece of property—who is this person? He is a government official. Well, he has got some contacts. I said, didn't he get a little embarrassed by this? Well, he has been dead for 20 years. [Laughter.]

If you go to Delhi, if you go to Mumbai, old Bombay, you will get on the highway there. You might get on an elevated highway and then all of a sudden you have to get off and wind your way through an area that is just teeming with people and pedestrians, and what can be—from downtown Mumbai to the airport is a 4-mile trip that takes 2 and a half hours. So when I say that we are falling behind, we are not falling behind India.

Now, if you want to go someplace fast in India—and I mean not fast but you will get on their railroads which function about like our 1940 rail system. And it is not fast but it is not slow. They were built before all this. So the railroads are relatively straight. But you could not build those railroads today.

In fact, we have a Honda plant in Birmingham. They wanted to have two rails instead of being a captive shipper. They were never able to build a 7-mile rail spur because of one property owner. And that was part of the deal that the State made them. But it delayed that plant 6 years. And we have had delays during 2008-2009, people out of work, still out of work. They want to be taxpayers. They do not want to be receiving public assistance. It all fits in.

One of the criticisms of the stimulus, which I am sure you heard in the construction business, was they did projects that were shovel-ready and not maybe because that was the best project. So you had a highway that had a bridge that was substandard or an elevated highway or you needed to do something. You needed to add a lane. Instead, you blacktopped over an area that maybe did not even need to be blacktopped then. But because that was shovel-ready, you could get a permit for that. So a lot of the work that was done as a result of the stimulus was—you know, we need to

put people to work right away. We do not have 5 years. So a lot of it was almost—you know, it was not the priorities. It was blacktopping roads and repairing curbs and things of that nature.

If no one else returns, I am going to ask two questions, and I will start with Mr. Kovacs. If there are true environmental problems with a given project, will the RAPID Act prevent Federal officials from assuring that those problems are avoided, minimized, or mitigated before a permit is granted in your opinion? And that is Mr. Slesinger or certain environmental groups are raising—

Mr. KOVACS. Absolutely. Whatever is being examined today under NEPA will be examined under the RAPID Act. For example, there have been no known environmental problems under SAFETEA-LU. So everything that was going on with NEPA still goes on.

Second, not only does it not affect NEPA, but it does not affect clean air or clean water. It does not affect any statute. What RAPID does is three very simple things.

It has a lead agency that is responsible for coordinating the project within a time frame. And I say within a time frame.

Second, it requires that people come in and out of the time frame in a managed way and that they cannot use sufficiency as a delaying tactic. Right now, one of the reasons that the process goes on forever is that nothing ever becomes sufficient. By putting time frames on it and requiring it to be managed in a time frame, the agencies come in, state their objections, and then they move out.

And finally, because of the statute of limitations in NEPA, which is a 6-year statute of limitations imposed by pure court order, the Federal Government ended up with a 6-year statute of limitations in an administrative proceeding that actually and for all other proceedings is 6 months.

So, again, nothing that has happened in SAFETEA-LU has shown that there have been problems. Nothing that is in RAPID actually moves into any substantive changes.

And finally, if you do not mind. You were talking about the stimulus act and blacktopping and shovel-ready projects. One of the reasons the Congress was even able and the executive was even able to get the projects done that were done is that on the floor of the Senate, Senator Boxer and Senator Barrasso came to an agreement and understood that if NEPA operated the way it normally operates that you would not have ever gotten to a shovel-ready project.

Now, I want to give you an idea because these are the Administration's numbers. Out of the 192,000 projects that were in the stimulus act that got constructed, 184,000 of them went under the most expeditious process possible. Otherwise, you would not even have had those projects done.

Mr. BACHUS. And those were just blacktopping. Most of them were very simple projects.

Mr. Ivanoff, do you want to comment on that?

Mr. IVANOFF. No. I think going back to your question about will the RAPID Act catch issues, I just want to reiterate that the process is not what we are talking about here. That is not what I think everyone here is speaking to. What we are speaking to is the review processes. And that is, I think again, having a lead agency

status is, I think, a good priority in this particular piece of legislation. And the second one is trying to get the agencies to do these reviews concurrently. If you have them sequentially, happen sequentially, you will find one agency, the Fish and Wildlife, will finish the first 6 months. Army Corps does not get to their review for a year or year and a half. All of a sudden, you have conflicting issues that might come up over a similar mitigation. And now you have to go back to an agency who has got other priorities. If you can address all of those in a timely manner through the first 6, 7, 8 months of this review process, now as a lead agency status, you can bring all of these agencies to the table and you resolve any of these kinds of conflicts in a coordinated and reasonable manner. And I think that is what will take a lot of this review process and shorten the time frame. That is what would help tremendously.

Mr. BACHUS. I know, Mr. Slesinger, you mentioned the Corps of Engineers. A lot of the delay is because they just do not have the funding.

Mr. SLESINGER. Yes.

Mr. BACHUS. Congressman Jo Bonner from Mobile can tell you about a project on Mobile Bay where a landowner wanted to build a camp for handicapped and challenged children with different developmental or physical handicaps. And he wanted to build a lake on that property. And the Corps took several years. I mean, it was a matter of 6-8 years. When they finally ruled, they asked him to do \$1 million worth of remediation. Now, he was going to give the land and build a camp. I think it was wetlands. Congressman Bonner would love to enter a statement for the record. But they were told to do remediation because they were affecting wetlands. And Congressman Bonner went with them to the land, and they were unable to find the wetlands. I am going to have him tell it exactly the way it was. But he said he is actually bitter about that. I would love to maybe have him back or maybe on the floor, if this bill comes to the floor, to talk about that.

How many jobs are we talking about creating, Mr. Kovacs, with RAPID Act's enactment, and how fast could these jobs become a reality? And maybe how long do you think they will last? I know they pay highly. I know the construction industry. Those are very good jobs. And we in this country are facing, a lot of people are saying, minimum wage jobs. But these are not minimum wage jobs.

Mr. KOVACS. Well, these certainly are not minimum wage jobs, but to give you an idea—and I do not know that anyone has done a study and compiled everything. But just on Project No Project, had those 351 projects been completed, that was a private sector investment of roughly \$570 billion. And our estimates were during the 7 years of construction, it would have been 1.9 million jobs a year, and thereafter, it would have been about 750,000 jobs a year. So you are close to 2 million.

On the Recovery Act, because of the fact that you needed some form of waiver from NEPA going through the most expeditious route, 184,000 of the projects out of the 192,000 projects went forward. The President's own estimates of the value of the stimulus was about 3.5 million to 5 million jobs. So if you took a million, 20 percent of that, and added it, you were at 3 million jobs there, and then whatever the jobs are created in SAFETEA-LU. So you are

looking at a minimum of 3 million jobs just by moving projects forward in a more rapid way.

Mr. BACHUS. Mr. Ivanoff, do you have any comment on those jobs and how much they pay?

Mr. IVANOFF. Well, in terms of jobs, obviously I totally agree with you. First of all, I think these construction jobs—I think you have to realize that they really cover an extremely broad spectrum. For these jobs, you have got to plan them out. You are going to have environmentalists take a look at it. You will have the environmental and scientific community get involved. You will have engineers, designers get involved designing the project. You will then go out to the construction. You will have, as you are saying, construction jobs. And to construct, you need to have equipment. So you are going to generate manufacturing jobs. The quarries have to bring in the cement. They have to bring in the aggregate.

So the beauty of the construction industry is that it does not just give you construction jobs, but you start off with early planning, engineering with the white-collar workers. You get to the blue-collar workers. And then once you have whatever it is you have constructed in place, that facility now generates economic activity. So it is one of the greatest multipliers, I believe, of economic activity that you could possibly have.

Mr. BACHUS. And obviously, some of the jobs you are creating—the Midwest where a lot of that equipment is made—those are places that need it.

Mr. IVANOFF. Peoria, Illinois, Caterpillar. Right?

Mr. BACHUS. Yes.

Mr. Duffy and then Mr. Slesinger.

Mr. DUFFY. I would just like to stress the same point for electric power facilities. It is a very labor-intensive job. Just for example, we have a project under construction that should be on line by this fall in Florida with 700 workers on the job site today and a 30-month construction schedule. We have done two projects of that scale in the interim while we are still trying to get this wind project permitted. And notably, neither of those triggered NEPA.

Mr. BACHUS. Mr. Slesinger?

Mr. SLESINGER. I would just want to point out that the things that were done to expedite the Recovery Act were using existing law. A lot of the improvements that Mr. Kovacs mentioned and Mr. Ivanoff mentioned were under the current law. And so, for instance, though there has been a lot of talk about doing concurrent reviews, that has been the CEQ policy for 20 years and that is how they move forward.

So I think a lot of the things that people want to happen are happening, but the real problem that is really delaying a lot of these projects are local NIMBY issues that are not part of the NEPA problem. So addressing NEPA, you are still avoiding maybe 90 percent of what is causing the delays that you are concerned about.

Mr. BACHUS. All right. Thank you.

Mr. SLESINGER. I would also want to note—and I do not want to speak for Mr. Duffy, but others of us are all on record of supporting more infrastructure, for raising revenues through gas taxes or otherwise to help that because we all agree—environmentalists, con-

struction, the Chamber—that we need to have a better infrastructure, and what we have been doing has been very short-sighted.

Mr. BACHUS. Thank you. I appreciate that. And I think there is ground for commonality and for agreement. I hope that we can get there.

At this time, I am going to recognize the gentleman, Mr. Marino, as I said several times, the sponsor of this legislation.

Mr. MARINO. Thank you, Chairman.

I think it was Mr. Ivanoff who hit on the point—I could be wrong. Maybe it was Mr. Slesinger as well. But this is a review piece of legislation, clearly a review piece of legislation. And I know, Mr. Slesinger, you said that there is existing law that has streamlined, but still we are looking at 7 to 10 years even taking into consideration that municipalities may have a part in slowing this down. And so I see what is happening.

I am going to use two examples of two agencies, EPA and Army Corps. The Army Corps is doing their review, and we say to EPA what is going on with your review. Well, we are not doing our review yet because we are going to wait till Army Corps is done. And I think it is critically important that these reviews be done simultaneously.

And you know what else would be, I think, very, very helpful is when I was in industry helping to build factories—and it was not a revelation, but one company could not figure out why they had to put so much into reinvesting in the factory. And I said who sat at the table to determine what the factory is going to be like. Well, our architect and the plant manager. I said did you ever think of bringing in people that are going to transfer in that work on the line. Did you ever think of having the electricians sitting there with you? Did you ever think of having the shipping department manager sit down and say what he or she needs? Because Mr. Ivanoff and I can sit down and we think we come up with a great idea on how to put something together and implement it, but we do not include Mr. Slesinger or Mr. Duffy or Mr. Kovacs. And they will say wait a minute. When it is up and running, they will say this is causing us a problem. So have the people at the table. Particularly the review agencies can talk back and forth saying, you know, that is an issue and we should look at that, but let's take a look at it from this approach.

And throwing money at it, it has proved in D.C. that it does not work. You know, look at the Department of Education. Look at the Department of Energy. Look at the money that we are throwing at agencies and bureaucracies, and we still have more kids dropping out of school than ever before. And we went from 25 percent dependency on foreign oil to 62 percent dependency on foreign oil. So what is happening over there?

And it just gets down to the point where—Steve, my friend, Mr. Cohen, brought up a point that made me think of something. Mr. Slesinger, you talked about a review process and one size does not fit all. And I am the first one to stand up and say one size does not fit all because it is obvious on the way it is working. It is not working now.

But perhaps we should explore this idea. I would like a period of a set, fixed time. However, if one agency comes in and says we

need more time for this review, I do not want that to stop the review, and I do not want that to be the only excuse. You need more time. You come in with substantive evidence on a very narrow issue specifically why you need more time and then address that issue immediately instead of just saying we need more time. There has got to be a group or a panel or someone that says tell us why you need more time and then when are you going to get to work on it.

Mr. Slesinger, do you want to respond to that?

Mr. SLESINGER. Yes. I think one thing we need to remember—and I want to expand on some of your points—is that if we can get people at the table, if we can get the local community buy-in from the beginning, you do much better. One of the issues we have with your bill is that you can have all these Federal agencies working together and meeting all your timelines, and then in the end, you have only 30 days or 60 days for public comment. And maybe all those people who are out there who are going to be affected are just hearing about it and have just an incredibly short time period to act. There are ways the system can work to bring people in earlier.

Mr. MARINO. We need an efficient, general form of notice.

Mr. SLESINGER. Exactly.

And another thing that we might want to look at is sometimes you cannot get everybody working immediately.

Mr. MARINO. I understand.

Mr. SLESINGER. For instance, if Mr. Ivanoff wants to cross the Hudson River but he does not know if he wants to do it—or the agency is not sure of a bridge or a tunnel is the way to go, the environmental impacts to do it when you do not know which of those two options is really on the table—

Mr. MARINO. Agreed.

Mr. SLESINGER. There are ways to do that more efficiently.

So, again, we think the bill needs to be aware of the fact that things are not—it is not just repaving the same road. A lot of these projects are very big.

And one thing I wanted to say where the bill is not process is the automatic permitting. Under the Atomic Energy Act, the Clean Water Act, the Clean Air Act, if the agencies do not get done in the 1 year, the permits automatically—

Mr. MARINO. Then shame on the agency. Then the agency needs to be revisited. Someone else needs to be running the agency. With the proper notice—with the proper notice—they should be on this unless, again, they come up with a reasonable exception as to why they cannot get into this process immediately.

Mr. SLESINGER. You could have some imaginary future Administration say, gee, this is a really politically difficult issue. I am just going to sit on my hand, not do anything, and let the permit be automatically approved. That is a concern.

Mr. MARINO. And then, you know, the voters are going to deal with the legislators, the people that they elect in office, to let something like that happen.

I am passionate about this. Please excuse my Sicilian passion. It is not directed at you, sir, or anyone else. And I think this is something, if we just roll our sleeves up and say let's just apply common sense, check our egos at the door, and what is best for this country,

we are going to be able to protect the environment, protect our children, and create jobs in a much shorter time than we are doing right now.

So I look forward to any input and any guidance that any one of you or anyone else wants to give me.

Mr. SLESINGER. I look forward to it.

Mr. MARINO. Thank you.

I yield back.

Mr. BACHUS. At this time, I recognize the gentleman, Hakeem Jeffries, from New York.

Mr. JEFFRIES. Thank you, Mr. Chair.

I have in my hand a letter from more than a dozen environmental groups in opposition to this legislation, as well as a CRS report from April 11 of last year, a statement of Administration policy dated July 23, 2012, and a letter from the Council for Environmental Quality from April of this year, that I would like to ask unanimous consent they be entered into the record.

Mr. BACHUS. Absolutely. Without objection. Seeing no objection, they are introduced.

[The information referred to follows:]

*** Alaska's Big Village Network * Alaska Inter-Tribal Council * Alaska Wilderness League * Center for Biological Diversity * Center for Water Advocacy *
 * Defenders of Wildlife * Earthjustice * Environmental Protection Information Center * Great Old Broads for the Wilderness * High Country Citizens' Alliance *
 * The Lands Council * League of Conservation Voters * Natural Resources Defense Council * Public Citizen * San Juan Citizens Alliance * Sierra Club * Southern Environmental Law Center * Western Environmental Law Center *
 * The Wilderness Society * Wilderness Workshop ***

July 11, 2013

Dear Representative:

On behalf of our millions of members and online activists, we are writing to urge you to oppose the "Responsibly and Professionally Invigorating Development Act of 2013" (H.R. __), which amends the federal Administrative Procedure Act (5 U.S.C. § 551-559) by requiring new procedures for regulatory review, environmental decisionmaking, and permitting processes for federal agency decisions and projects. Instead of improving the permitting process, the RAPID Act will severely undermine the National Environmental Policy Act (NEPA) and, consequently, the quality and integrity of federal agency decisions.

The National Environmental Policy Act plays a critical role in ensuring that projects are carried out in a transparent, collaborative, and responsible manner. NEPA simply requires federal agencies to assess the environmental impacts of proposals, solicit the input of all affected stakeholders, and disclose their findings publicly *before* undertaking projects that may significantly affect the environment. NEPA's fundamental tenet is to ensure that the public – which includes industry, citizens, communities, local and state governments, and business owners – can make important contributions by participating in federal government decision-making and providing unique expertise and insight on impacts from proposed projects. Also crucial for informed government decisions, NEPA mandates the consideration of alternative ways of achieving a proposed action, thus ensuring decision-makers and developers are fully informed before proceeding with a project.

RAPID Act provisions such as the following will significantly undermine this bedrock environmental law by:

Placing Arbitrary Limitations on Environmental Reviews – The bill threatens to undermine NEPA's goal of informed decisionmaking and the agency's role of acting in the public interest by setting arbitrary deadlines on environmental reviews with default approval of permits, licenses, or other applications in cases of delay – regardless of the possible economic, health, or environmental impacts.

Limiting Consideration of Alternatives – The bill strikes at the heart of the NEPA process by restricting the range of alternatives to be considered by an agency.

Creating Serious Conflicts of Interests – The bill blurs the distinct roles of private entities and agencies in agency decisions by allowing project sponsors to prepare environmental documents under NEPA and any other federal law, such as the Clean Water Act and the Endangered Species Act, which creates inherent conflicts of interest and thus jeopardizes the integrity of the decisionmaking process

Restricting Judicial Review –The bill would restrict judicial review and force stakeholders into court preemptively simply to preserve their right to judicial review.

Limiting Public Comment Periods – The bill limits the amount of time the public has to comment on NEPA documents and any other associated environmental review documents prepared under any other federal law.

Provisions such as these in the RAPID Act will only serve to increase delay and confusion around the environmental review process. We believe compromising the quality of environmental review and limiting the role of the public is the wrong approach. A far more sensible approach that would improve the efficiency of the process is to urge agencies to use the existing, but underused, flexibilities that exist within NEPA, and were detailed last year by the Council on Environmental Quality (CEQ). The guidance released by CEQ, “Improving the Process for Preparing Efficient and Timely Environmental Reviews Under NEPA,” provides additional measures that can be implemented to ensure that an environmental review process can be conducted in a timely and efficient manner.

The National Environmental Policy Act has proven its worth as an invaluable tool to ensure that the public, developers, and agencies have an agreed upon template that consistently and fairly assesses proposals that may impact federal resources. The RAPID Act contradicts and jeopardizes decades of experience gained from enacting this critical environmental law. Further, it tips the balance away from informed decisions, jeopardizing the public’s right to participate in how public resources will be managed. Please oppose this unnecessary and overreaching piece of legislation.

Sincerely,

Carl Wassilie
Yupiaq Biologist
Alaska’s Big Village Network

Bill Snape
Senior Counsel
Center for Biological Diversity

Delice Calcote
Executive Director
Alaska Inter-Tribal Council

Nikos Pastos
Environmental Sociologist
Center for Water Advocacy

Leah Donahey
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Mary Beth Beetham
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Defenders of Wildlife

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Allison Melton
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Scott Slesinger
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Director and Conservation Advocate
Wilderness Workshop



The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress

Linda Luther
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April 11, 2012

Congressional Research Service

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CRS Report for Congress

Prepared for Members and Committees of Congress

Summary

Under programs administered by the Department of Transportation's (DOT's) Federal Highway Administration (FHWA), certain highway and bridge projects may be eligible for federal funding. Project approval and the receipt of federal funds are conditioned on the project sponsor (e.g., a local public works or state transportation agency) meeting certain standards and complying with federal law. Activities necessary to demonstrate compliance with those requirements may be completed at various stages of project development. Although the names of each stage may vary from state to state, project development generally includes the following: planning, preliminary design and environmental review, final design and rights-of-way acquisition, construction, and facility operation and maintenance.

When there is debate over the time it takes to complete federal highway projects, the environmental review stage has been a primary focus of congressional attention concerning legislative options to speed project delivery. The current process includes activities necessary to demonstrate that all potential project-related impacts to the human, natural, and cultural environment are identified; effects of those impacts are taken into consideration (among other factors such as economic or community benefits) before a final decision is made; the public is included in that decision-making process; and all state, tribal, or federal compliance requirements applicable as a result of the project's environmental impacts are, or will be, met.

Compliance requirements depend on site-specific factors, including the size and scope of the project, and whether and to what degree it may affect resources such as parks, historic sites, water resources, wetlands, or urban communities. For all proposed federal-aid highway projects, however, some level of review will be required under the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. §4321 et seq.). Broadly, NEPA requires federal agencies to consider the environmental effects of an action before proceeding with it and to involve the public in the decision-making process.

The time it takes to complete the NEPA process is often the focus of debate over project delays attributable to the overall environmental review stage. However, the majority of FHWA-approved projects require limited documentation or analyses under NEPA. Further, when environmental requirements have caused project delays, requirements established under laws other than NEPA have generally been the source. This calls into question the degree to which the NEPA compliance process is a significant source of delay in completing either the environmental review process or overall project delivery. Causes of delay that have been identified are more often tied to local/state and project-specific factors, primarily local/state agency priorities, project funding levels, local opposition to a project, project complexity, or late changes in project scope. Further, approaches that have been found to expedite environmental reviews involve procedures that local and state transportation agencies may implement currently, such as efficient coordination of interagency involvement; early and continued involvement with stakeholders interested in the project; and identifying environmental issues and requirements early in project development.

Bills in the House and Senate (the American Energy and Infrastructure Jobs Act of 2012 (H.R. 7) and Moving Ahead for Progress in the 21st Century (MAP-21; S. 1813)) would reauthorize DOT programs. Both include provisions intended to expedite project delivery by changing elements of the environmental review process, particularly NEPA requirements. This report provides information on existing NEPA and environmental review requirements, particularly requirements that may be subject to change under the House and Senate proposals.

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Introduction

Under programs administered by the Department of Transportation's (DOT's) Federal Highway Administration (FHWA), certain highway and bridge projects may be eligible to receive federal-aid funding.¹ As a condition of receiving those funds, a project sponsor (e.g., a local or state transportation agency) must meet certain standards and requirements applicable to activities completed at every stage of project development. Although the names of those stages may vary somewhat from state to state, those stages generally include initial project planning, preliminary design/engineering and environmental review, final design and rights-of-way acquisition, construction, and facility operation and maintenance.

Each stage of project development is initiated and completed largely at the state or local level, with FHWA having ultimate responsibility for ensuring that individual projects comply with requirements applicable to federal-aid highways.² Also, each development stage involves a range of activities that will affect the time it takes to deliver the project. Required elements of the preliminary design and environmental review stage will vary by project, but generally include processes necessary to identify and demonstrate compliance with environmental requirements applicable to that project.

When there is debate over the time it takes to complete federally funded highway projects,³ particularly debate over activities that may expedite or delay project delivery, various elements of the environmental review stage of project development have been the focus of attention. However, whether or the degree to which elements of that process may delay projects is unclear.⁴

The two most recent laws authorizing DOT programs included requirements intended to expedite the environmental review process that focused primarily on procedures necessary to demonstrate compliance with the National Environmental Policy Act of 1969 (NEPA, 42 U.S.C. §4321 et seq.).⁵ Current legislation to authorize DOT programs in the House and the Senate (the American Energy and Infrastructure Jobs Act of 2012 (H.R. 7) and Moving Ahead for Progress in the 21st Century (MAP-21; S. 1813)) also include provisions intended to expedite project delivery that focus primarily on the NEPA process.⁶

¹ This report focuses on projects approved under programs administered by FHWA. Although they involve similar regulatory requirements, issues unique to transit projects approved under programs administered by the Federal Transit Administration (FTA) are not addressed in this report.

² Those requirements are largely established under Chapter 1, "Federal-aid Highways," of Title 23, "Highways" of the U.S. Code.

³ In this report, reference to "federal-aid highways," "federal highways," or "federal highway projects" means projects that may receive federal funding pursuant to the Federal-aid Highways provisions of Title 23. Those projects include, but are not limited to, the initial construction, reconstruction, replacement, rehabilitation, restoration, or other improvements of a highway, road, street, parkway, right-of-way, bridge, or tunnel.

⁴ See CRS Report R41947, *Accelerating Highway and Transit Project Delivery: Issues and Options for Congress*, by William J. Mallett and Linda Luther.

⁵ The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU or SAFETEA; P.L. 109-59, for FY2005-FY2009) and the Transportation Equity Act for the 21st Century (TEA-21; P.L. 105-178, for FY1998-FY2003).

⁶ H.R. 7 was reported favorably by the House Transportation and Infrastructure Committee on February 13, 2012. MAP-21 passed the Senate on March 14, 2012.

Despite the focus on the NEPA process, it is unclear whether or how changes to that process would result in faster highway project delivery. Available evidence regarding potential causes of project delays associated with environmental compliance is largely anecdotal and specific to unique, individual projects. Still, that evidence, while limited, points to issues or requirements apart from NEPA as more common causes of project delays.

This report identifies issues relevant to the debate over the role of the environmental review process in transportation project delivery. It identifies social and environmental issues that led Congress to enact the range of requirements that now make up the environmental review process, as well as selected requirements applicable to its implementation (particularly NEPA requirements). The report also identifies complexities in tying the environmental review process to federal-aid highway project delivery time. In particular, it identifies issues that make it difficult to determine the time it takes to complete the project development process, in general, or individual stages of development (e.g., activities related explicitly to environmental reviews); or to identify root causes of project delays tied to specific elements of the environmental review process. This report also discusses various approaches identified by transportation stakeholders as those that have expedited the environmental review process and overall project delivery.

Information and issues in this report were selected to help Members of Congress and their staff understand the NEPA compliance process as well as additional environmental compliance requirements that may be affected by H.R. 7 and MAP-21. Discussion of specific legislation is provided separately in CRS Report R42445, *Surface Transportation Reauthorization Legislation in the 112th Congress: MAP-21 and H.R. 7, Major Provisions*, coordinated by Robert S. Kirk.

Background and Overview of Issues

Activities that may take place during the environmental review process and how that process is implemented will vary from project to project, from state to state. The environmental review process does not involve compliance with a single federal compliance requirement. It involves processes necessary to demonstrate compliance with a potentially wide array of requirements applicable to projects approved under the Federal-aid Highways program. Broadly, for federally funded highway projects, it involves two separate, but related processes—preparing appropriate documentation required under NEPA; and identifying and demonstrating compliance with any additional state, tribal, or federal environmental requirements applicable to that project.

For a given project, how NEPA and other environmental compliance requirements must be demonstrated will largely depend on the degree to which the proposed project would have adverse effects on communities, natural or cultural resources (e.g., wetlands, endangered species habitat, historic sites, parks, or recreation areas), or special status land (e.g., farmland, floodplains, or coastal zones). Compliance with those requirements may include obtaining a permit, approval, study, or some level of analysis or consultation from an agency outside DOT.

NEPA was intended, in part, to ensure that federal agencies would consider the environmental impacts of an action among other factors (e.g., economic or community benefits) in the federal decision-making process. NEPA has two primary aims—to assure that federal agencies consider the environmental effects of their actions *before* proceeding with them and to involve the public in the decision-making process.

NEPA does not require an agency to elevate environmental concerns above other factors in the overall federal decision-making process. If the adverse environmental effects of a proposed action are adequately identified and evaluated, an agency is not constrained by NEPA from deciding that other project benefits outweigh the environmental costs and moving forward with the action. In contrast, other requirements applicable to federal-aid highways *may* dictate or somehow affect the outcome of a project decision. For example, other federal laws may require the selected project alternative to be the one with the least impact to a particular resource, prohibit FHWA approval of a project alternative that uses certain resources, require certain mitigation measures to limit a project's impacts, or require that certain activities take place in accordance with certain criteria (e.g., as specified in a permit or approval).

Environmental Reviews and Project Delays

Required elements of the environmental review process, particularly compliance with NEPA, will have an effect on project development. For example, before DOT can approve a project and allow final project design, property acquisition, or project construction to proceed, the project sponsor must appropriately document compliance with NEPA and complete any investigation, review, or consultation necessary to demonstrate compliance with other applicable environmental requirements. Further, it is DOT policy to use the NEPA compliance process as a mechanism to balance transportation decision making by taking into account the potential impacts on the human and natural environment and the public's need for safe and efficient transportation.⁷

State and local transportation agency officials and other stakeholders with an interest in transportation improvement generally acknowledge that elements of the environmental review process provide important protections to the human, cultural, and natural environment. However, those officials also sometimes argue that completing the process can be difficult and time-consuming. Some have argued, for example, that the time it takes to complete required NEPA documentation and supporting analysis or to obtain required input or approval from outside agencies can delay completion of federally funded transportation projects.

It is generally not disputed that the time it takes to complete the environmental review process for federally funded highway projects can take months or even years. What is unclear is the degree to which elements of the environmental review process directly or routinely *delay* project delivery. Determining the time it takes to complete activities associated with the environmental review process, or delays directly attributable to those activities, is difficult for several reasons including, but not limited to:

- **Limits to available data.** There is no centralized source of data regarding highway project delivery. States generally do not track project development time from planning to construction. States generally do not attempt to isolate elements of the environmental review process, which may overlap with preliminary project planning, design, or engineering activities. Further, there is no standard measure for determining when a project or the environmental review process, in particular, is completed "quickly" or would be considered "delayed."

⁷ See *NEPA and Project Development: Program Overview* on FHWA's "Environmental Review Toolkit" webpage at <http://environment.fhwa.dot.gov/projdev/index.asp>.

- **The influence of local factors on project delivery.** The environmental review process may start, stop, and restart for reasons unrelated to environmental issues. Local and state issues have been shown to have the most significant influence on whether a project moves forward relatively quickly or takes longer than anticipated. Those issues include the project's level of priority among others proposed in the state; changes in funding availability; and local controversy or opposition to the project (which may or may not be connected to environmental issues).
- **The variation in project type and complexity.** The wide range of projects approved under programs administered by FHWA (e.g., bridge repair versus major new highway construction) do not easily allow an "apples to apples" comparison of the time it takes to complete the environmental review process or factors that may delay it. Anecdotal evidence regarding projects identified as "delayed" have involved multiple, complex causes of delay (including local issues) unique to *that* project, not a single cause that may be commonly applicable to other projects.
- **Variation among state requirements and implementation processes.** The effect of requirements under federal law may be difficult to isolate since local, state, or tribal requirements and procedures will also affect how environmental compliance requirements are implemented. State DOTs implement their project delivery process differently, depending on factors specific to their state and its needs. For example, some states may implement unique design and contracting processes that expedite project delivery that other states do not.
- **Time "saved" cannot be gauged.** Depending on the scope and complexity of the project, more time spent addressing environmental issues in the project planning and preliminary design stage may result in faster completion of final design and project construction (when delays may require actions that take more time and money to address). Time may also be saved when adverse project impacts that could lead to local opposition to the project are identified and addressed during the early stages of project development.

Challenges to Tying Project Delays to NEPA Compliance

Transportation agency officials and project sponsors have broadly identified environmental compliance requirements as a common source of frustration in completing the project development process. However, limits to and contradiction in available data make it difficult to clearly identify specific causes of delay that are directly and routinely attributable to specific elements of environmental compliance. Identifying a distinct root cause of a delay will arguably be necessary before effective "solutions" (procedures that would result in faster project delivery) can be identified. That is, knowing *that* a delay occurred may be irrelevant if it is not determined *why* the delay occurred. An understanding of *why* is useful in identifying a solution that directly addresses a problem's underlying cause.

Determining why a project was delayed may be difficult or may be attributable to multiple, interrelated factors. Generally, the more complex the project, the more complex the potential cause(s) of delay. For example, compared to a maintenance or repair project, a major new construction project will require more extensive review, documentation, or analysis to demonstrate compliance with NEPA and other applicable environmental requirements. However,

the following factors call into question the degree to which NEPA alone is a significant source of project delay in overall project development:

- **The majority of projects require limited review under NEPA.** The majority of FHWA-approved projects (approximately 96%) involve no significant environmental impacts and, hence, require limited documentation, analysis, or review under NEPA.
- **Compliance with DOT's "NEPA regulations" extends beyond what is required under NEPA.** DOT's "Environmental Impact and Related Procedures"⁸ prescribe the policies and procedures to ensure that FHWA-approved projects will comply with NEPA as well as requirements established under Title 23 applicable to Federal-aid Highways (e.g., provisions applicable to the consideration of adverse economic, social, and environmental effects (under §109(h)), public hearings (§128), and preservation of parklands (§138)).
- **The NEPA compliance process is used to demonstrate compliance with all applicable environmental review requirements.** It is DOT policy that any investigation, review, or consultation necessary to demonstrate compliance with applicable environmental requirements be completed within the context of the NEPA process. This use of NEPA as an "umbrella" compliance process can blur the distinction between what is required under NEPA and what is required under separate authority.

Transportation agency officials asked to identify sources of frustration or delay in completing the environmental review process most commonly cite compliance requirements applicable to the protection of parklands, historic sites, wetlands, or threatened or endangered species. The potential root cause of delay in complying with those requirements could be attributable to a wide range of project-specific factors (e.g., incomplete permit applications, challenges in obtaining multiple approvals or permits for a complex project, or disagreement with a resource agency over appropriate methods to mitigate project impacts).

Both existing law and regulations implementing NEPA include explicit directives and requirements intended to streamline the NEPA process. Included among those requirements are procedures intended to coordinate efficient agency interaction and cooperation, reduce NEPA-related paperwork and duplication of effort (e.g., documentation and analysis that may be required by similar state, tribal, or federal requirements or from one stage of project development to the next), and integrate the consideration of environmental compliance issues in a project's planning stage. Barriers to efficiently implementing existing requirements may be project-specific or involve issues that may be difficult to address by simply amending or eliminating existing federal requirements.

This is not to suggest that there are not instances where preparation of documentation and analysis required under NEPA is not time-consuming or may contribute to delays in project delivery. However, it is unclear whether or what additional federal requirements may be implemented to expedite the NEPA process. Conversely, it is not clear whether the elimination of certain NEPA-specific requirements may expedite project delivery or would alter the framework for coordinating an already complex compliance process, resulting in additional project delay. For

⁸ 23 C.F.R. Part 771.

a given project, whether changes to the NEPA process might result in faster project delivery will likely depend on the project's scope and complexity; the degree to which it is affected by "local" factors (e.g., state funding or project priorities); and compliance requirements applicable to the project, in addition to those under NEPA.

Highway Construction Impacts That Led to the Current Process

To understand why a complex array of requirements may apply to highway projects, it is useful to understand the social and environmental concerns that led Congress to enact the various laws that now form the framework of the environmental review process. Each requirement included within that process represents past efforts by Congress to minimize adverse impacts from federally funded highway projects or to minimize adverse impacts to certain communities or resources that Congress identified as needing some level of protection.

The current debate over the environmental review process frequently centers around the effect that completion of that process has on project delivery. The debate rarely recognizes the issues that led Congress to enact the requirements that now make up that process. Requirements included within the environmental review process, and procedures to demonstrate compliance with them, have evolved over the past 50 years. However, many of the requirements that are subject to particular scrutiny today were enacted between 1966 and 1972.

During the 1950s and 1960s, the public was becoming increasingly aware of and concerned about the impacts that human activity were having on the environment. Increasing attention turned to the effect that federally funded programs and projects were having on the human, cultural, and natural environment. One federal program that generated particular concern was the development and construction of the Interstate Highway System.

The Federal-Aid Highway Act of 1956 (P.L. 84-627) authorized and provided revenue sources for the construction of the National System of Interstate and Defense Highways (commonly known as the Interstate Highway System, Interstate System, or the Interstate). The Interstate System is a network of limited-access roads including freeways, highways, and expressways forming part of the National Highway System of the United States.⁹ Construction of the Interstate System took approximately 35 years and resulted in a network of roads and bridges that currently includes over 45,000 miles of rural highways, suburban and urban freeways, and bridges.¹⁰

Although the connection of rural, urban, and suburban communities resulted in a host of economic and cultural benefits, construction of the Interstate System also brought certain adverse impacts to both the human and natural environment. Those impacts were seen particularly in the construction of the urban freeways. Planning for such projects often involved locating freeways within available open space or where land acquisition costs were relatively low. "Available open

⁹ The National Highway System is approximately 160,000 miles of roadway important to the nation's economy, defense, and mobility.

¹⁰ For more information about the Interstate Highway System, see the U.S. Department of Transportation's Federal Highway Administration website, "Celebrating the Eisenhower Interstate Highway System," <http://www.fhwa.dot.gov/interstate/homepage.cfm>.

space” often meant historic sites, parks, or recreation areas. Adverse impacts to those resources from highway projects drew increased attention from newly formed stakeholder groups with an interest in environmental protection and historic preservation.

Project planning that involved lower land acquisition costs often meant property acquisitions in densely populated, working-class or high-poverty neighborhoods. Resulting urban freeway projects had a disproportionate impact on the urban poor. One such example involved a segment of I-95 north of Miami. The route selected by local transportation officials cut through the inner-city community of Overtown, a once-thriving African-American community known as the “Harlem of the South.” A 2009 FHWA report discussing lessons learned in complying with environmental requirements describes the project as follows:

In 1957, the Overtown community was almost decimated by the development of the I-95 and I-395 freeways. The constructed roadway had a disastrous impact on the economic and social structure of the community. The community continues to shoulder the lingering effects of those negative impacts, and as a result there is also persistent anger towards and distrust of [the Florida Department of Transportation].¹¹

Opposition to other urban freeway projects led to “freeway revolts” spearheaded by newly established environmental and social justice groups.¹² Freeway revolts took place in cities like Baltimore, Boston, Los Angeles, New Orleans, New York, Reno, and San Francisco. As a result, a significant number of projects were abandoned or significantly scaled back due to widespread public opposition, especially by those whose neighborhoods would be disrupted or who would be displaced by the proposed freeways.

Elements of the Environmental Review Process

By the mid to late 1960s, Congress began to enact legislation intended to address the growing public concern over projects implemented under the Federal-aid Highways program. During that period, Congress also enacted legislation in response to increasing awareness and concern over the impacts of all federal actions—not just federal highway projects. Also during the 1960s and into the 1970s Congress began to enact a wide range of laws intended to identify, prohibit, control, or mitigate adverse impacts of human activities to specific community, natural, or cultural resources that Congress identified as in need of certain protection. This report identifies and summarizes requirements that have been identified as those most commonly applicable to federally funded highway projects.

¹¹ Report prepared by the John A. Volpe National Transportation Systems Center Research and Innovative Technology Administration, U.S. Department of Transportation for the Office of Project Development and Environmental Review, Federal Highway Administration, “Strategies and Approaches for Effectively Moving Complex Environmental Documents Through the FIS Process: A Peer Exchange Report,” January 2009, available on the Federal Highway Administration’s “Streamlining/Stewardship” website at <http://environment.fhwa.dot.gov/streaming/eisdocs.asp>.

¹² For a discussion of issues related to freeway revolts and general issues with urban freeway construction, see “Paved with Good Intentions: Fiscal Politics, Freeways and the 20th Century American City,” by Jeffrey A. Brown, Eric A. Morris, and Brian D. Taylor, in the University of California Transportation Center’s *Access* magazine, Fall 2009, available at http://www.uctc.net/access/35/access35_Paved_with_Good_Intentions_Fiscal_Politics_.html.

Requirements Applicable to Federal-aid Highways

FHWA is prohibited from approving a project for funding under the Federal-aid Highway program until the project sponsor demonstrates that the proposed project will comply with all applicable federal, tribal, and state requirements. To the extent possible, compliance with any requirements that apply to a project, as a result of that project's effect on the human and natural environment, must be appropriately documented and demonstrated during the environmental review stage of project development.

Requirements specific to Federal-aid Highways include a host of standards, procedures, and conditions applicable to the various stages of project development. Several requirements (applicable primarily to activities that take place during the project planning, preliminary design, and environmental review phases of development) reflect concern over the effects of urban freeway construction (discussed above), including the following:

- **Directive to establish guidelines to assure consideration of adverse project impacts (23 U.S.C. §109(h)).** Directed DOT to establish guidelines to assure that possible adverse, economic, social, and environmental effects of proposed highway projects and project locations were fully considered during project development, and that final project decisions be made in the best overall public interest, taking into consideration the costs of eliminating or minimizing adverse effects to air, noise, and water pollution; destruction or disruption of man-made and natural resources; aesthetic values, community cohesion, and the availability of public facilities and services; adverse employment effects, and tax and property value losses; and injurious displacement of people, businesses, and farms.
- **Directive to establish noise standards (23 U.S.C. §109(i)).** Directed DOT to establish standards for highway noise levels compatible with different land uses. DOT cannot approve plans and specifications for any proposed federal-aid project unless it includes adequate measures to implement those noise standards. As implemented under DOT regulations, a project may be required to demonstrate compliance with applicable standards through an analysis of traffic noise impacts and, when necessary, to implement noise abatement measures.
- **Public hearings requirements (23 U.S.C. §128).** For a proposed project bypassing or going through any city, town, or village, a state transportation department is required to certify that it held or afforded the opportunity for public hearings; considered the economic and social effects of the project location, and its impact on the environment; and considered the consistency of the project with local planning goals and objectives.
- **Preservation of parklands requirements (23 U.S.C. §138).** More commonly referred to as "Section 4(f)"¹³ requirements, DOT is prohibited from approving a

¹³ The term "Section 4(f)" refers to the section of the Department of Transportation Act of 1966 (P.L. 89-670) under which the requirement was originally set forth. It was initially codified at 49 U.S.C. §1653(f) and only applied to DOT agencies. Later that year, 23 U.S.C. §138 was added with somewhat different language, which applied only to the highway program. In 1983, as part of a general recodification of the DOT Act, §1653(f) was formally repealed and codified in 49 U.S.C. §303 with slightly different language. This provision no longer falls under a "Section 4(f)," but DOT has continued this reference, given that over the years, the whole body of provisions, policies, and case law has been collectively referenced as Section 4(f).

project that uses publicly owned (local, state, or federal) parks and recreation areas, wildlife and waterfowl refuges, and publicly or privately owned historic sites of national, state, or local significance. DOT may approve a project that uses a 4(f) resource only if there is no prudent and feasible alternative to do otherwise, and that use includes all possible planning to minimize harm to the resource.

Of the requirements specifically applicable to Federal-aid Highways, the preservation of parklands requirements may have the greatest effect on highway project development and delivery. Projects that would use a 4(f) resource require an evaluation analyzing project alternatives (including location and design shifts) that avoid the resource.¹⁴ To be approved by FHWA, the evaluation must show that alternatives that would *not* use the resource would result in “truly unique problems,” resulting in costs or community disruption of extraordinary magnitude. This test is often referred to as the “Overton Park Criteria,” after a court case in the 1970s in Memphis, TN.¹⁵ In approving the use of a 4(f) resource, FHWA must also consider the significance and importance of the resource itself.

SAFETEA amended Section 138 to allow for the use of a 4(f) resource if that use can be proven to have *de minimis* impacts to the resource.¹⁶ Generally, *de minimis* impacts would result from the use of minor amounts of a particular resource. Such a determination requires concurrence from an official with jurisdiction over the resource. For example, for a transportation project adjacent to a publicly owned park, recreation area, or wildlife and waterfowl refuge, FHWA would be required to consult with, as appropriate, agencies within the Department of the Interior (e.g., the U.S. Fish and Wildlife Service, National Park Service, or the Bureau of Indian Affairs) or state or local park authorities. For historic sites, a *de minimis* impacts determination must be based on criteria established under the National Historic Preservation Act applicable to uses that will have no “adverse effect” on the site (16 U.S.C. §470f). The determination must receive concurrence from the State Historic Preservation Officer (SHPO) and, if appropriate, the Advisory Council on Historic Preservation (ACHP).

Compared to other environmental requirements likely applicable to federal-aid highway projects, Section 4(f) is unique in its limits on the use of a protected resource. Most requirements intended to protect communities or specific natural or cultural resources allow for adverse project impacts if those impacts are sufficiently identified and considered in the decision-making process. Some requirements may specify that a project implement certain mitigation measures or be implemented in accordance with an approval or permit from an agency responsible for protecting that resource. An outright prohibition on the use of a particular resource, except for *de minimis* impacts or under extraordinary conditions, is not common to other environmental requirements.

Requirements Applicable to “Federal Actions”

In the 1960s Congress debated legislative options to address potential adverse impacts associated with federal actions. An action may be deemed “federal” based on the role that a federal agency

¹⁴ Depending on project alternatives under consideration for a given project, compliance with Section 4(f) requirements can be complex. This report does not discuss those requirements in detail. For more information, see the “Section 4(f)” website included in FHWA’s “Environmental Review Toolkit” at <http://www.environment.fhwa.dot.gov/4f/index.asp>.

¹⁵ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

¹⁶ See Department of Transportation, “Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites,” final rule, 73 *Federal Register* 13367-13401, March 12, 2008.

plays in a project's approval or funding. A project funded under the Federal-aid Highways program would generally be considered a federal action. Two laws applicable specifically to federal actions that significantly affect the environmental review process for highway project development are NEPA and the National Historic Preservation Act (16 U.S.C. §470, et seq.).

As discussed previously, NEPA has two primary aims—to require federal agencies to consider the environmental impacts of a project and to give the public a meaningful opportunity to learn about and comment on the proposed project *before* a final decision is made. It is a procedural statute. That is, NEPA requires federal agencies to implement procedures to ensure that environmental impacts of a project are included among, but not elevated above, other factors considered during the federal decision-making process. If the adverse environmental impacts of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other benefits (e.g., community and economic benefits) outweigh the environmental costs and moving forward with the action. (The NEPA compliance process is discussed under “Demonstrating Compliance with NEPA.”)

The National Historic Preservation Act (NHPA) declared a national policy of historic preservation to protect districts, sites, buildings, structures, and objects significant to American architecture, history, archaeology, and culture. NHPA did not mandate preservation of historic resources or prohibit adverse impacts to them, but Section 106 requires all federal agencies to *consider* the impacts of a proposal prior to taking any action that may affect a site included in, or eligible for inclusion on, the National Register of Historic Places.

NHPA also requires federal agencies to afford the Advisory Council on Historic Preservation (an independent federal agency created by the law) a reasonable opportunity to comment on federal actions that would affect properties on or eligible for inclusion on the National Register of Historic Places. For federally funded highway projects, FHWA must consult with the Advisory Council or the designated SHPO to determine project impacts to historic sites and potential ways to mitigate those impacts.

There are similarities between requirements established under Section 4(f) and Section 106, but also important differences between the statutes. Like NEPA, Section 106 establishes a procedural requirement that directs all federal agencies only to consider project impacts on certain resources. Section 4(f) applies only to DOT projects and prohibits the use of certain resources for those projects, except under certain conditions.

Additional federal laws and executive orders apply explicitly to federal actions that affect certain resources or communities. For example, a federally funded highway project may require compliance with additional requirements applicable to federal actions if that project may:

- involve the acquisition, rehabilitation, or demolition of real property that will displace persons from their homes, businesses, or farms as protected under the Uniform Relocation Assistance and Real Property Acquisition Act of 1970 (42 U.S.C. §4601, et seq., more commonly referred to as the Uniform Act);
- affect wetlands or floodplains pursuant to Executive Order 11990 or Executive Order 11988, respectively;
- convert farmland to nonagricultural uses pursuant to the Farmland Protection Policy Act of 1981 (7 U.S.C. §4201 et seq.);

- cause disproportionately high and adverse impacts on minority and low-income populations with respect to human health and the environment pursuant to Executive Order 12898; or
- affect human remains and cultural material of Native American and Hawaiian groups pursuant to the Native American Grave Protection and Repatriation Act (25 U.S.C. §3001 et seq.).

Requirements Applicable to Certain Resources

In addition to requirements applicable to federal-aid highways, specifically, and federal actions, in general, Congress has enacted a host of individual statutes intended to protect certain natural, environmental, and cultural resources from human-induced activities. A potentially long list of federal compliance requirements *could* apply to a given highway or bridge project, but requirements that will *actually* apply to a project will be limited by site-specific conditions and the degree to which the proposed project may affect protected resources. Broadly, highway projects may be subject to requirements intended to identify, minimize, or control adverse impacts to:

- **Land**—including land use that may affect the habitat of threatened or endangered plant and animal species, migratory birds, archaeological sites, and land designated as a national trail or national wilderness; and
- **Water resources or water quality**—including projects that may affect wetlands, aquatic ecosystems, navigable waters (e.g., rivers, streams, harbors), floodplains, coastal zones, or designated “wild and scenic” rivers, or projects that may affect water quality (e.g., discharge pollutants into U.S. waters).¹⁷

For a given federally funded highway project, compliance with a number of federal, state, or tribal regulations intended to identify, control, mitigate, or minimize project impacts to land and water resources may be required. Specific compliance requirements will depend on standards or regulatory requirements of that law and the degree to which the proposed project may adversely affect that resource. Depending on those factors, project development and implementation may require some level of consultation, analysis, or approval from an agency with jurisdiction over the resource. For example, a highway or bridge project that results in pollutants being discharged into wetlands, rivers, or streams or that may affect navigable waterways or harbors likely will require project development be completed in accordance with provisions established under the Clean Water Act or the Rivers and Harbors Act. Pursuant to those laws, the selection of a particular project alternative may require a permit or certification from the Army Corps of Engineers (the Corps), the Environmental Protection Agency (EPA), the United States Coast Guard, or a state or tribal water quality control agency.

¹⁷ Air quality issues are also relevant to federal-aid highway project development. Under the Clean Air Act, FHWA must insure that transportation plans, programs, and projects conform to the state’s air quality implementation plans. Conformance with a state implementation plan is largely determined during project planning. Issues associated with meeting federal air quality requirements are not discussed in this report.

Implementing the Environmental Review Process

The individual requirements discussed above were enacted by Congress after a particular concern arose or need was identified. For an individual project, several requirements involving similar compliance directives could apply. For example, depending on its impacts, a project may be subject to different public hearing or notification requirements under separate federal regulatory or statutory requirements.

The environmental review process is intended to function as the mechanism under which potentially duplicative requirements are identified and coordinated (including duplicative state or tribal requirements). Specifically, it is DOT policy that, to the fullest extent possible, any investigation, review, and consultation necessary to demonstrate environmental compliance be coordinated as a single process. The environmental review process *is* that single process. It forms the framework under which *all* applicable compliance requirements intended to protect the human, natural, or cultural environment are identified and demonstrated. Further, the NEPA compliance process forms the framework for completing the environmental review process.

In the past, suggestions made by transportation stakeholders to expedite project delivery, as well as legislative options proposed by some Members of Congress, have focused on requirements established specifically under NEPA. However, examples of individual projects delayed by environmental requirements more often involve issues associated with environmental compliance obligations established under separate state or federal requirements. In identifying and determining the potential effectiveness of nationally applicable approaches to expedite the environmental review process, it is necessary to distinguish between what is required explicitly under NEPA versus other federal environmental requirements.

Demonstrating Compliance with NEPA

The Council on Environmental Quality (CEQ) promulgated regulations implementing NEPA that were broadly applicable to all federal agencies.¹⁸ CEQ required each federal agency to develop its own NEPA procedures specific to typical classes of actions undertaken by that agency.¹⁹ In 1987, DOT promulgated “Environmental Impact and Related Procedures.”²⁰ Those regulations prescribe the policies and procedures for FHWA to implement NEPA as it may apply to federally funded highway projects. They also include procedures necessary to ensure compliance with environmental requirements established under Title 23 applicable to Federal-aid Highways (e.g., procedures necessary to demonstrate compliance with requirements applicable to economic, social, and environmental effects, public hearings, and preservation of parklands (Section 4(f))). DOT’s regulations have been revised periodically in accordance with legislative directives from Congress and to reflect court decisions applicable to DOT’s implementation of both the NEPA process and its other environmental compliance obligations. Most recently, the regulations were modified to reflect the new environmental review process established under SAFETEA.

¹⁸ 40 C.F.R. §§1500-1508.

¹⁹ 40 C.F.R. §1507.3.

²⁰ 23 C.F.R. Part 771.

Identifying the Appropriate NEPA Document

For a given highway project that receives funding or approval under Federal-aid Highways programs, compliance with NEPA is demonstrated in the “NEPA document.” Requirements that define the various categories of NEPA document and required elements of each are found in the NEPA regulations promulgated by both CEQ and DOT.

Transportation projects vary in type, size, complexity, and potential to affect the environment. To account for the variability of potential project impacts, NEPA regulations establish three basic “classes of action” that dictate how NEPA compliance will be documented and implemented. Determining the appropriate NEPA document and level of environmental review and analysis necessary for that document is dependent upon the answer to the following question: “Will the proposed action have any significant environmental impact?” Answers to that question, and the corresponding NEPA documents, are as follows:

- **Yes.** Those projects require an Environmental Impact Statement (EIS) followed by a final Record of Decision (ROD).
- **Maybe.** When the significance of a project’s impacts is not clear, an Environmental Assessment (EA) must be prepared to determine whether an EIS is necessary or a Finding of No Significant Impact (FONSI) is appropriate.
- **No.** Those projects are categorically excluded from the requirement to prepare an EIS or EA; as such, those projects are generally referred to as Categorical Exclusions (CEs or CATEX).

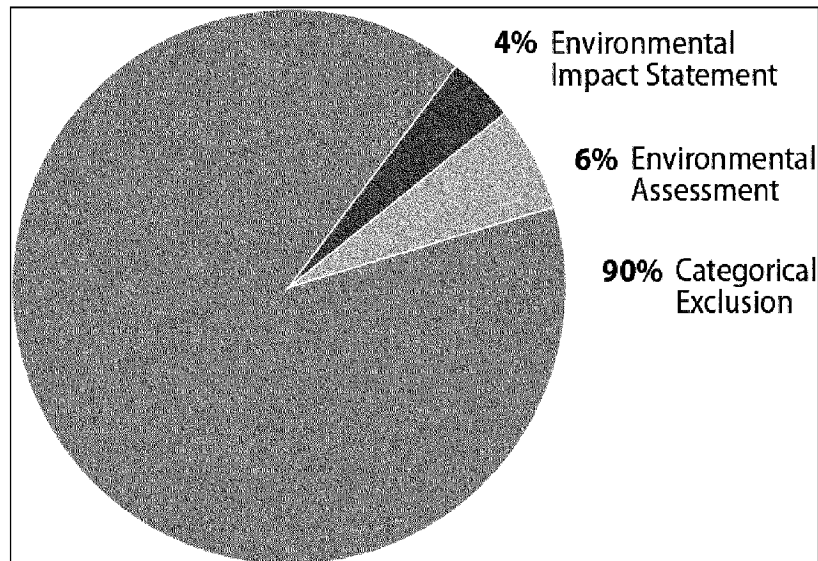
Pursuant to NEPA’s aims, an evaluation of environmental impacts is required prior to commitment of federal resources. To meet that requirement, preparation of the NEPA document may begin in the project planning stage, but must be completed within the preliminary design and environmental review stage of project development. Generally, subsequent stages of project development (final design activities, property acquisition, or project construction) cannot proceed until the necessary NEPA document is complete and approved by FHWA.

FHWA-Approved Projects By NEPA Class of Action

Major highway projects that require an EIS are the most studied and discussed when there is debate over the time it takes to complete the NEPA process. Further, past legislative efforts to expedite the NEPA process have focused primarily on the NEPA process as it applies to EIS preparation. However, FHWA data from 1998 to 2007 show that approximately 4% of federal-aid highway projects approved under programs administered by FHWA required an EIS. Projects processed as a CE or with an EA/FONSI accounted for approximately 96% (see **Figure 1**).

Figure 1. FHWA-Approved Projects—By NEPA Class of Action

Average from 1998 to 2007



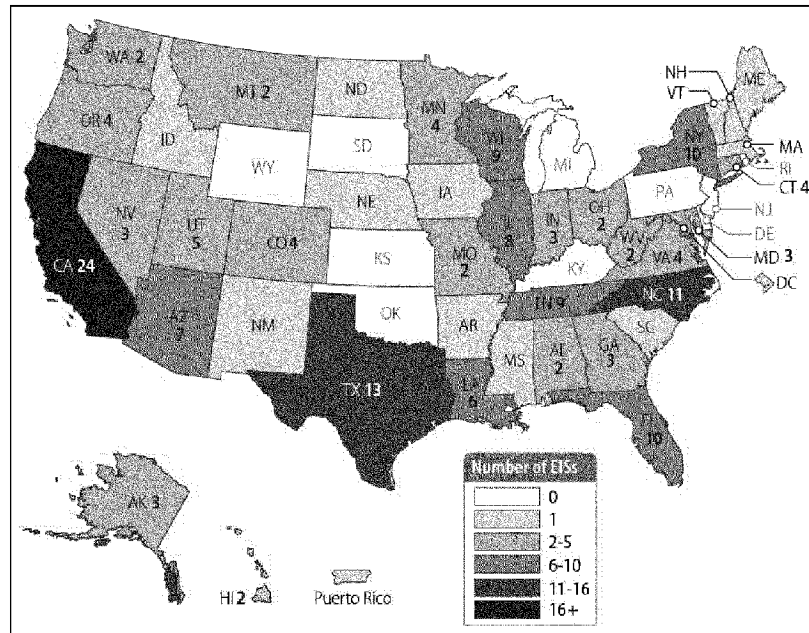
Source: Congressional Research Service, based on data available from FHWA's "Streamlining/Stewardship: Performance Reporting" website at <http://www.environment.fhwa.dot.gov/streaming/projectgraphs.asp/>.

More recent FHWA data illustrate a similar proportion of major new projects and smaller maintenance/rehabilitation projects. In FY2009, of the approximately 55,043 miles of roadway projects receiving federal-aid highway funds, approximately 50,166 miles (91%) involved reconstruction projects with no added roadway capacity, restoration and rehabilitation activities, or road resurfacing (i.e., projects likely to be processed as CEs). Approximately 4,877 miles of road construction projects involved new construction, relocation, or reconstruction with added capacity (i.e., projects likely to require preparation of an EA or EIS).²¹

In addition to representing a small number of overall projects, few projects currently being developed require an EIS. As of November 18, 2011, 10 states had no active projects that involved EIS preparation, 12 states and the District of Columbia and Puerto Rico were preparing 1, and 18 states were preparing between 2 and 5 (illustrated in **Figure 2**). Further, a significant number of active EISs (68 of 175 or 39%) were being prepared in just five states—California, Texas, North Carolina, Florida, and New York.

²¹ These statistics apply to projects funded under the Federal-aid Highway program. For more detail, see the Federal Highway Administration's "Highway Statistics for 2009: Obligation of Federal-Aid Highway Funds For Highway Improvements Fiscal Year 2009 (Intended to Show Only Projects Authorized in FY 2009)," Table FA-10, October 2010, available at <http://www.fhwa.dot.gov/policyinformation/statistics/2009/fa10.cfm>.

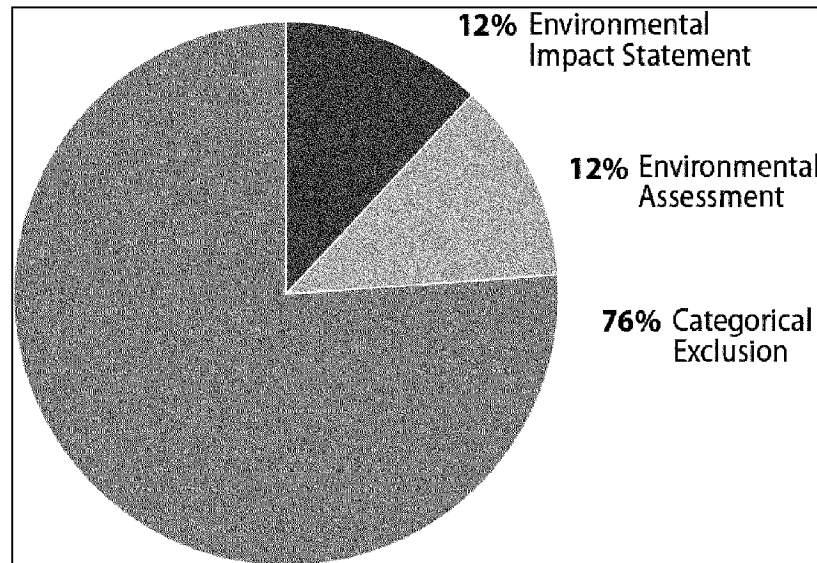
Figure 2. Active FHWA Projects Requiring an EIS in Each State



Source: Congressional Research Service, based on FHWA's list of Active and Inactive Environmental Impact Statements (EISs) as of November 18, 2011, available on the agency's "NEPA and Project Development" website at http://www.environment.fhwa.dot.gov/projdev/active_eis.asp.

While projects requiring an EIS represent a small proportion of total projects and a small number of active projects being developed in each state, they are more likely to be high-profile, complex projects that affect sizeable populations and take years, even decades, from planning to construction. They may cost millions, or even hundreds of millions, of dollars. For example, data from 1998 to 2007 regarding FHWA funding allocation show that while projects processed as CEs generally represent 90% of projects approved, those projects accounted for approximately 76% of FHWA program funds. Over that period, projects requiring an EIS accounted for approximately 4% of the total projects approved, but 12% of allocated program funds (see Figure 3).

Figure 3. Percentage of FHWA Program Funding Allocation by NEPA Class of Action
Average from 1998 to 2007



Source: Congressional Research Service, based on data available on FHWA's "Streamlining/Stewardship: Performance Reporting" website, <http://www.environment.fhwa.dot.gov/streaming/projectgraphs.asp/>.

While a project requiring an EIS will likely cost more than a project processed as a CE, there is not necessarily a direct relationship between a project's cost and its level of environmental impacts. For example, it cannot be stated that projects that cost over \$1 million, or even \$10 million, will require an EIS. This point is illustrated by reviewing FHWA's list of "Major Projects," defined to include those expected to receive over \$500 million in federal assistance.²² Included on FHWA's list of currently active major projects are several that are being processed as CEs or with an approved FONSI.²³ For example, the "Loop 12/State Highway 35E Corridor" project in the Dallas-Fort Worth, TX, area is described as a reconstruction and widening project estimated to cost \$1.6 billion. Project letting for that project began after approval of an EA/FONSI. Also included on the list is the "I-595 Corridor Improvements Project." That project, determined to be a CE, will add reversible lanes and involve major interchange improvements along 10.5 miles of the I-595 corridor in Florida. It is estimated to cost \$1.8 billion.

²² That definition of "Major Projects" was included among provisions in Section 1904 of SAFETEA that amended the "Project approval and oversight" requirements under 23 U.S.C. §106. The identification of a project as "major," in this context, is unrelated to its potential distinction as a "major federal action significantly affecting the quality of the human environment" pursuant to NEPA under 42 U.S.C. §4332(c).

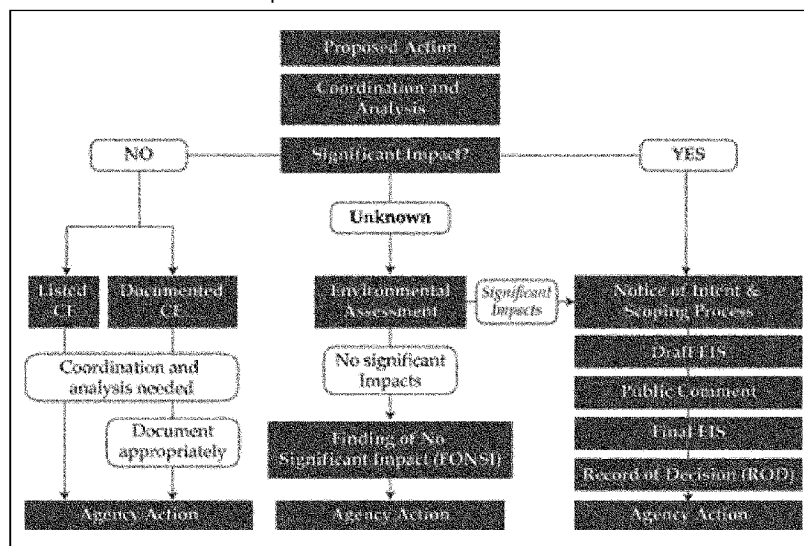
²³ See the *FHWA Active Project Status Report*, available on FHWA's "Project Delivery" website, <https://fhwaapps.fhwa.dot.gov/foisp/publicActive.do>.

Selected Requirements for Each Category of NEPA Document

Each NEPA document (EIS, EA, and CE) must include certain required elements (see **Figure 4**). That is, the NEPA document must show that environmental impacts were considered as part of the federal decision-making process, not a paperwork exercise to document impacts from a project after a decision was made.

Figure 4. NEPA Decision-Making Process

Required Elements of NEPA Documentation



Source: FHWA guidance document, *Integrating Road Safety into NEPA Analysis: A Primer for Safety and Environmental Professionals*, in the "FHWA Environmental Toolkit," available at http://www.environment.fhwa.dot.gov/projdev/pd6rs_primer_sec2.asp.

Requirements applicable to each element of each NEPA document, and how DOT requires an applicant for federal funds to demonstrate compliance with each element, largely evolved in the 20 years after NEPA was enacted. Those requirements are reflected in both CEQ and DOT regulations implementing NEPA. The evolution of the NEPA compliance process was also influenced by the courts. For example, the courts played a prominent role in determining issues such as what constitutes "significant" impacts, who must prepare an EIS, at what point an EIS must be prepared, and how adverse comments from agencies should be handled. Changes to required elements of the NEPA process, applicable to projects funded under DOT programs, are also made by Congress.

Selected requirements applicable to each category of NEPA document, including requirements established under SAFETEA, are discussed below.

Categorical Exclusion (CE) Determinations

As discussed above, projects processed as CEs represent the greatest proportion of projects approved for federal-aid highway funds. DOT defines CEs as actions that, based on past experience with similar actions, do not individually or collectively have a significant impact on any natural, cultural, recreational, historic, or other resource, or involve significant air, noise, or water quality impacts; and that will *not*

- induce significant impacts to planned growth or land use for the area;
- require the relocation of significant numbers of people;
- have significant impacts on travel patterns; or
- otherwise, either individually or cumulatively, have any significant environmental impacts.²⁴

A project may meet these criteria, but still involve “unusual circumstances” that would require FHWA to ensure that a CE designation is appropriate. Unusual circumstances applicable to federally funded highway projects include substantial project controversy on environmental grounds; a significant impact on properties protected under Section 4(f) or Section 106 of the National Historic Preservation Act (NHPA); or inconsistencies with any federal, state, or local requirements relating to the environmental aspects of the action.²⁵

DOT identifies two groups of surface transportation projects that would likely meet the CE criteria (absent any unusual circumstances applicable to the project). The first group includes specific actions that meet criteria applicable to CEs.²⁶ DOT has determined that these projects (presented in Table 1) will likely result in insignificant environmental impacts because they either do not involve or directly lead to construction or involve minor construction.

Table 1. Federally Funded Highway Projects Specifically Listed as CEs

Non-construction activities (e.g., planning, technical studies, or research activities).	Emergency repairs after a natural disaster or catastrophic failure.
Installing fencing, signs, pavement markings, small passenger shelters, and traffic signals that involve no substantial land acquisition or traffic disruption.	Deploying electronic, photonic, communication, or information processing systems to improve system efficiency or safety.
Altering a facility to make it accessible to elderly and handicapped persons.	Landscaping activities.
Implementing ridesharing programs.	Improving existing rest areas or truck weigh stations.
Scenic easement acquisition.	Installing noise barriers.
Activities in a state highway safety plan.	Constructing bicycle or pedestrian lanes or facilities.

Source: Congressional Research Service, taken from actions listed at 23 C.F.R. §771.117(c).

²⁴ 23 C.F.R. §771.117(a); further DOT criteria used to determine whether a project would meet necessary CE criteria extend from CEQ regulations defining CEs at 40 C.F.R. §1508.4.

²⁵ 23 C.F.R. §771.117(b).

²⁶ Listed at 23 C.F.R. §771.117(c).

A proposed action included in this list may or may not require an applicant for federal funds to submit supporting documentation to FHWA. Necessary paperwork could range from a simple checklist to substantial documentation. The extent of paperwork or supporting documentation is directly related to the extent of the impacts and necessary analysis of those impacts. For example, construction of a bicycle path or installation of traffic signals in a historic district may require some level of compliance with Section 106 of the NHPA or Section 4(f).

The second group of CEs includes actions that past DOT experience has shown to have substantial, but generally not “significant,” effects.²⁷ For this group, DOT regulations include “examples” of actions commonly approved by FHWA that may meet the regulatory definition of a CE (presented in Table 2). Such projects require the project sponsor to provide FHWA with documentation to confirm that the project does not involve “unusual circumstances” resulting in significant environmental impacts. Unlike specifically “listed CEs” (Table 1), the potential universe of “documented CEs” is not limited to projects identified by DOT. Instead, FHWA may approve a CE designation for any action as long as documentation is provided that demonstrates the project meets the regulatory definition of a CE.

Table 2. Examples of FHWA-Approved Projects That May Be Classified as a CE
Actions That May Be Designated a CE with Appropriate Documentation and FHWA Approval

Highway modernization through resurfacing, restoration, rehabilitation, or reconstruction.	Bridge rehabilitation, reconstruction, or replacement.
Highway safety or traffic operations improvement projects.	New truck weigh station or rest area construction.
Approval for changes in access control.	Approval for disposal of excess right-of-way or for joint or limited use of right-of-way.
Acquisition of certain preexisting railroad right-of-way.	Land acquisition for hardship or protective purposes.
Construction of transportation corridor fringe parking facilities.	

Source: Congressional Research Service, taken from examples of actions listed at 23 C.F.R. §771.117(d).

Although they are excluded from the requirement to prepare an EIS or EA, CEs are sometimes incorrectly identified as being exempt from NEPA or having *no* environmental impacts. No *significant* environmental impact *under NEPA* does not mean the project has *no other* regulated environmental impacts. For example, to demonstrate that a project meets both the CE criteria and will comply with other environmental requirements, state DOTs routinely gather information regarding a CE’s potential to

- involve work that requires highway traffic or construction noise abatement;
- be located within certain limits of a sole source aquifer or alter stream flow;
- involve the acquisition of more than minor amounts of temporary or permanent right-of-way;
- require a Section 4(f) evaluation or “an opinion of adverse effect” under Section 106 of NHPA;

²⁷ Listed at 23 C.F.R. §771.117(d).

- involve commercial or residential displacement;
- involve work in wetlands that would require a permit from the Corps; or
- be constructed in a county that lists federal threatened and endangered species.

A project may involve any one or more of these (or other) activities that will have some effect on the human or natural environment, yet have environmental impacts that do not rise to the level of “significant” under NEPA. However, the threshold of significant impacts is primarily relevant to NEPA compliance. Other laws intended to protect or mitigate impacts to natural or cultural resources will have their own compliance thresholds applicable to *that* law. FHWA approval of a project processed as a CE may be delayed if the project sponsor does not realize that its proposed project may be subject to compliance requirements in addition to NEPA.

Within its responsibilities to oversee the Federal-aid Highway program, FHWA typically establishes procedures with each state DOT regarding CE review and approval. In a given state, “listed CEs” generally require minimal documentation before FHWA approval. NEPA review for those projects would be included as part of FHWA’s project oversight and approval obligations established under Title 23. For “documented CEs,” FHWA either reviews the NEPA documentation as part of the project development process and any agreed-upon procedures as part of the project review and approval, or the state DOT does this review in accordance with a formal programmatic CE agreement established between FHWA and the state DOT.

A programmatic CE agreement sets forth specific project circumstances for which a CE could be processed, and maintains FHWA oversight and responsibility for the NEPA determination. A programmatic approach involves establishing a streamlined process for handling routine environmental requirements, commonly applicable to specific types of project (e.g., bridge maintenance or road resurfacing activities). It allows for repetitive actions to be considered on a programmatic basis rather than project by project. Established on a local, regional, or statewide basis, a programmatic CE may establish procedures for consultation, review, and compliance with one or more federal laws. FHWA suggests that, to the extent possible, state DOTs take a programmatic approach to CE determinations.

Apart from its potential to enter into programmatic CE agreements with FHWA, state DOTs may assume FHWA responsibility for CE determinations. Pursuant to provisions in Section 6004 of SAFETEA,²⁸ FHWA may assign and a state DOT may assume responsibility for determining whether certain highway projects meet the CE criteria. Under that authority, a participating state would be authorized to determine all CE applicability, including determining whether proposed projects that are not specifically listed under DOT’s NEPA regulations may meet the CE criteria.

States that choose to assume FHWA responsibility would be required to do so in accordance with terms and conditions established in a memorandum of understanding (MOU) between the state and FHWA.²⁹ States assuming federal authority are legally liable for the NEPA determination. That is, FHWA would not be liable for the NEPA determinations for CEs in states participating in the program. FHWA would be required to conduct an annual review of a participating state’s

²⁸ 23 U.S.C. §326.

²⁹ For more information, see memorandum from the U.S. Department of Transportation, Federal Highway Administration, to Directors of Field Services and Division Administrators, regarding “Guidance on the State Assumption of Responsibility for Categorical Exclusions (CE),” April 6, 2006, available at <http://www.fhwa.dot.gov/hep/6004memo.htm>.

process for making CE determinations. To date, three states (Alaska, California, and Utah) have requested and been assigned responsibilities under the Section 6004 program.

Environmental Impact Statements (EIS)

Projects requiring an EIS make up the smallest percentage of projects approved by FHWA, but have generated the most attention when debating NEPA's potential role in delaying highway projects. FHWA does not specifically identify actions that require an EIS. That determination must be made on a case-by-case basis. However, DOT identifies the following as examples of highway projects that normally require an EIS: a new controlled access freeway; a highway project of four or more lanes on a new location; and new construction or extension of a separate roadway for buses or high-occupancy vehicles not located within an existing highway facility.³⁰

Both the steps to complete an EIS and the EIS itself include certain required elements. Each required element represents the evolution of NEPA compliance requirements—as established by CEQ and, in part, as a result of judicial interpretation of NEPA's mandate and how its procedural requirements must be implemented. Required components in EIS preparation are

- file a Notice of Intent (NOI)
- scope the environmental issues
- prepare a draft EIS
- circulate the draft EIS for comment
- prepare the final EIS
- issue a final record of decision (ROD)

The NOI serves as the formal announcement of the project to the public and to interested federal, state, tribal, and local agencies.³¹ As soon as possible after, or in conjunction with, the determination that an EIS is needed, the agency is required to determine the scope of the project. During that process, the project sponsor/applicant for federal funds should determine which environmental laws, regulations, or other requirements may apply to the project. During the scoping process, routes that may pose certain challenges and could be avoided may be identified (e.g., the presence of terrain or resources that may involve potential engineering or technical problems, regulatory restrictions, or public opposition). For example, during the scoping process, a potential route or alignment may be identified that would avoid property of historical significance, endangered species habitat, or wetlands—each of which may require compliance with the NHPA, the Endangered Species Act, or the Clean Water Act, respectively.

Once the scope of the action and its environmental issues have been determined, EIS preparation can begin. Required elements of an EIS, including selected elements in DOT's NEPA regulations or FHWA policy, are summarized in **Table 3**.

³⁰ 23 C.F.R. §771.115(a).

³¹ 40 C.F.R. §1508.22.

Table 3. Required Elements of an EIS as Implemented by FHWA

Elements of an EIS	Definition/Description
Purpose and need statement (§1502.13)	A brief statement, developed by the lead agency, specifying the underlying purpose of a project and the need to which the agency is responding. According to FHWA, this section may be the most important, as it establishes why the agency is proposing to spend large amounts of taxpayers' money while at the same time causing significant environmental impacts. A clear, well-justified statement explains to the public and decision makers that the use of funds is necessary and worthwhile, particularly as compared to other needed highway projects. The statement forms the basis on which potential alternatives to meet that need are identified and a final alternative is ultimately selected. It cannot be so narrow that it effectively defines competing "reasonable alternatives" out of consideration. The "purpose" may be a discussion of the goals and objective. The "need" may be a discussion of existing conditions that call for some improvement, including those applicable to transportation demand, safety, legislative direction, urban transportation plan consistency, modal interrelationships, system linkage, and the condition of an existing facility.
Alternatives (§1502.14)	Defined as the "heart" of the EIS, this section includes the identification and evaluation of all reasonable alternatives that may meet a project's purpose and need. FHWA requires the range of alternatives to include a discussion of how and why all reasonable alternatives were selected for consideration, and to explain why other alternatives were eliminated from detailed study. Each alternative, and its associated impacts, must be evaluated in sufficient detail to allow decision makers and the public an opportunity to compare the merits of each option.
Affected environment (§1502.15)	A succinct description of the environment of the area(s) to be affected or created by the alternatives under consideration. DOT requires this section to include a description of the existing social, economic, and environmental setting of the area potentially affected by all alternatives presented in the EIS. Data may include demographics of the general population served by the proposed project, as well as an identification of socially, economically, and environmentally sensitive locations or features in the proposed project area. For example, the EIS should identify the presence of affected minority or ethnic groups, parks, hazardous material sites, historic sites, or wetlands, among other factors.
Environmental Consequences (§1502.16)	Analysis of impacts of each project alternative on the affected environment, including a discussion of the probable beneficial and adverse social, economic, and environmental effects of each alternative. Where applicable, this section must include a description of the measures proposed to mitigate adverse impacts and methods of compliance with applicable legal requirements. FHWA recommends this section be devoted largely to a scientific analysis of the direct and indirect environmental effects of the proposed action relative to each alternative. Potential environmental consequences identified by FHWA include land use, farmland, social, economic, air quality, noise, water quality, wetland, wildlife, floodplain, or construction impacts; the requirement to obtain any permits; impacts to wild and scenic rivers, coastal barriers, threatened or endangered species, historic and archeological preservation, or hazardous waste sites; and any irreversible and irretrievable commitment of resources. This section would likely require input from other federal, state, tribal, or local agencies with expertise on the environmental consequences under review.
List of preparers (§1502.17)	List of names and qualifications of individuals responsible for preparing the EIS. FHWA requires this section to include lists of state and local agency personnel, including consultants, who were primarily responsible for preparing the EIS/performing environmental studies and FHWA personnel responsible for EIS preparation/review.
Appendix (§1502.18)	Prepared if necessary. An appendix normally consists of material that substantiates analysis fundamental to the impact statement.

Source: Congressional Research Service, taken from CEQ regulatory definitions under 40 C.F.R. §1502 and requirements and definitions applicable to highway projects included in FHWA guidance "NEPA and Transportation Decisionmaking: The Importance of Purpose and Need in Environmental Documents," and "Guidance for Preparing and Processing Environmental and Section 4(f) Documents."

The EIS is prepared in two stages, resulting in a draft and a final EIS.³² Supplemental documents may be required in some instances. Among other requirements, the final EIS must identify the preferred project alternative; reflect an evaluation of all reasonable alternatives considered; identify and respond to public and agency comments on the draft EIS; and summarize public involvement. The final EIS should document compliance with requirements of all applicable environmental laws, executive orders, and other related requirements. If full compliance is not possible by the time the final EIS is prepared, it should reflect consultation with the appropriate agencies and provide reasonable assurance that the requirements will be met. FHWA approval of the environmental document constitutes adoption of any findings and determinations in the EIS. The ROD presents the basis for the agency's final decision and summarizes any mitigation measures that will be incorporated in the project.

Each required element of the EIS involves compliance requirements established under both NEPA and other environmental requirements. For example, a clear delineation of project purpose and need is also necessary to meet the requirements under Section 4(f), executive orders on wetlands and floodplains, and permitting requirements established under Section 404 of the Clean Water Act. Identifying the potentially affected environment and analysis of environmental consequences also demonstrate that environmental impacts are considered during, not after, the decision-making process (as required under NEPA), but also include consultation, analysis, or input from resource agencies that may be necessary to ensure compliance with other applicable environmental law.

SAFETEA included several provisions that applied to projects that require an EIS. Section 6002 amended Title 23 by adding "Efficient Environmental Reviews for Project Decision-making" (§138). It established a new environmental review process applicable to all highways, transit, and multi-modal projects requiring an EIS. Among other requirements, the new process

- requires the project sponsor to notify DOT of the type of work, termini, length, general location of the proposed project, and a statement of any anticipated federal approvals;
- establishes a new entity required to participate in the NEPA process, referred to as a "participating agency," which includes any federal, state, tribal, regional, and local government agencies that *may have an interest in* the project;³³
- requires the lead agency to establish a plan for coordinating public and agency participation in and comment on the environmental review process for a project or category of projects;
- requires the lead agency to establish a 60-day deadline on agency and public comments on a draft EIS and a 30-day deadline on all other comment periods in the environmental review process, except under certain circumstances (e.g., the deadline is extended by the lead agency for "good cause"); and
- prohibits claims seeking judicial review of a permit, license, or approval issued by a federal agency for highway or transit projects unless they are filed within 180 days after publication of a notice in the *Federal Register* announcing the

³² 40 C.F.R. §1502.9.

³³ This category of agency participant in the NEPA process differs from a "cooperating agency," discussed below, that is defined as an agency having jurisdiction by law or special expertise with respect to any environmental impact of a proposed project or project alternative.

final agency action, unless a shorter time is specified in the federal law under which the judicial review is allowed (previously, the six-year limit under the Administrative Procedure Act applied to NEPA-related claims).

DOT has produced guidance to help state DOTs implement SAFETEA's revised environmental review process and modified regulations implementing NEPA to reflect SAFETEA's amendments to Title 23.³⁴

The National Cooperative Highway Research Program conducted a survey of state DOTs to determine their impressions of the new environmental review process established by SAFETEA. The DOTs responding to the survey were generally favorable regarding the act's requirements.³⁵ In particular, there was wide approval of the 180-day statute of limitations.³⁶ However, survey respondents expressed concerns about some provisions, including their impressions that it represented no major change from what state DOTs were doing previously; it duplicated existing coordination procedures; and DOT already involved outside agencies prior to implementing the new procedures. Further, many survey respondents expressed concern that some requirements of the new environmental review process seemed to run counter to streamlining initiatives by creating additional requirements that could have a negative impact on schedules and budgets.³⁷

Under Section 6005, SAFETEA amended Title 23 to establish a "Surface Transportation Project Delivery Pilot Program" (§327). The pilot program allowed Oklahoma, California, Texas, Ohio, and Alaska to assume certain federal environmental review responsibilities (in addition to the assumption of CE determinations established under Section 6004, discussed above). Responsibility could be assumed for environmental reviews required under NEPA, or any federal law, for one or more highway projects within the state. As a condition of assuming federal authority, Congress required the state to waive its right to sovereign immunity against actions brought by citizens in federal court and consent to the jurisdiction of federal courts. That is, the state would become solely liable for complying with and carrying out the federal authority that it consents to assume.

To date, only California has agreed to and developed a program to participate in the pilot program. Other states declined, primarily due to state legislature concerns regarding the potential liability associated with assuming federal responsibility for NEPA.

Additionally, some state transportation agency officials and stakeholders with an interest in transportation project development have expressed concern over DOT requirements implementing the pilot program (as required pursuant to the directive in Section 6005). Those objections have centered largely around DOT's requirement applicable to rights-of-way (ROW) acquisitions in states that choose to assume federal authority under NEPA. As discussed earlier,

³⁴ See "SAFETEA-LU Environmental Review Process, Final Guidance," November 15, 2006, available at <http://www.fhwa.dot.gov/hep/section6002/index.htm> and the Department of Transportation's "Environmental Impact and Related Procedures; Final Rule," 74 *Federal Register* 12517, March 24, 2009.

³⁵ See the National Cooperative Highway Research Program's "Legal Research Digest 54: Practice Under the Environmental Provisions of SAFETEA-LU," December 2010, available at http://onlinepubs.trb.org/onlinepubs/nchrp/nchrp_lrd_54.pdf.

³⁶ There was also wide approval of changes made to Section 4(f) under SAFETEA Section 6002, applicable to *de minimis* project impacts (see "Requirements Applicable to Federal-aid Highways" regarding the "preservation of parklands" requirements).

³⁷ See the summary of survey respondent impressions of SAFETEA provisions at pp. 16-21.

one of NEPA's primary aims is to ensure that federal agencies consider the impacts of their actions before proceeding with them. The NEPA process cannot simply document a decision that has already been made. This requirement means that federal funds cannot be used for ROW acquisitions (an action that could indicate that a final project decision has been made) before the NEPA process is complete. Currently, states may make ROW acquisitions using state funds on an at-risk basis. That is, they may purchase land using state funds, but risk losing future federal funding for that purchase if the project ultimately involves an alternative that does not use that property. By assuming DOT's authority, a state would assume federal agency-level responsibility to comply with NEPA. DOT has found that would mean, in its capacity as a federal agency, the state would be precluded from making such advanced ROW acquisitions.

Some have argued that the loss of a state's ability to make at-risk ROW acquisitions has been a disincentive to states that may otherwise want to assume federal authority under NEPA. However, when the fear of taking on federal liability and subjecting the state to the jurisdiction of federal court were primary reasons that states did not want to assume NEPA authority, it is unclear how states could be protected from potential judicial review if they are allowed to complete a transaction that *could appear* to violate one of NEPA's primary goals. Although state DOTs may be willing to accept that risk, a state legislature may not, particularly when an incentive for a state to assume the federal role under NEPA is to eliminate FHWA's oversight of the NEPA process (e.g., FHWA's legal sufficiency review of an EIS).

Environmental Assessments (EAs)

The third category of NEPA document is an EA. It is required for an action that is not a CE and does not clearly require an EIS, or where FHWA believes an EA would assist in determining the need for an EIS. An EA is intended to be a concise public document that serves to provide sufficient evidence and analysis for determining whether to prepare an EIS or a Finding of No Significant Impact (FONSI).³⁸

In preparing an EA, the applicant, in consultation with FHWA, is required to consult with interested agencies at the earliest appropriate time to determine the project scope; determine which aspects of the proposed action have potential for social, economic, or environmental impact; identify alternatives and measures which might mitigate adverse environmental impacts; and identify other environmental review and consultation requirements which should be performed concurrently with the EA.³⁹

The EA is subject to FHWA approval before it is made available to the public. The document itself need not be circulated, but must be made available for public inspection and comment (typically for at least 30 days). A notice of availability must be sent to state- and area-wide clearinghouses and should be published locally. Depending on FHWA-approved state procedures, a public hearing may or may not be required.

FHWA requires the basis of a request for a FONSI be clearly and adequately documented. Like an EIS, the EA or FONSI is required to clearly document compliance with NEPA and all other applicable environmental laws, executive orders, and related requirements. An approved FONSI functions as the final agency decision on a project.

³⁸ 40 C.F.R. §1508.9.

³⁹ 23 C.F.R. §771.119(b).

Like projects processed as CEs, determining the time it takes to complete an EA is difficult. Local and state transportation officials do not routinely, nor could they easily, track the time it takes to complete an EA. A distinct end point could be identified (issuance of a FONSI), but a starting point may be hard to identify. Further, since EAs likely require limited environmental review or analysis under NEPA, any analysis or review that is prepared to support a FONSI would likely be required under separate state or federal law. However, transportation agency officials have complained that EAs sometimes approach the length of an EIS. If that is the case, factors indirectly related to the NEPA compliance likely apply to the project. For example, a project that may involve local controversy or opposition, but still have no significant impacts, may require more analysis or documentation than anticipated. Also, a project with substantial environmental impacts to certain resources may require time-consuming consultation, analysis, or approvals from agencies outside DOT to confirm that no significant impacts will occur, or it could be an indication that an EIS should have been prepared initially.

Agency Roles and Responsibilities in the NEPA Process

The NEPA document is prepared by a “lead agency,” and may require input and analysis from “cooperating” or “participating” agencies. Depending on the environmental impacts of a given project, both the lead and cooperating agencies are obligated to meet certain federal requirements. The time it takes to meet those obligations has been identified by transportation agencies as a potential source of frustration or project delay.

Lead Agencies

The “lead agency” is the federal agency responsible for preparing the NEPA document.⁴⁰ DOT must serve as the lead federal agency for a federally funded transportation project (FHWA generally serves as the lead for highway projects). The direct recipient of federal funds for the project must serve as a joint lead agency (a requirement explicitly established under SAFETEA). For a federal-aid highway project, that is typically the state DOT, but may include a local agency project sponsor or a federally recognized Indian tribal governmental unit. At the discretion of the required lead agencies, other federal, state, or local governmental entities may act as joint lead agencies. These include, but are not limited to toll, port, and turnpike authorities and metropolitan planning organizations (MPOs). For example, the U.S. Department of Homeland Security may serve as a joint lead agency with DOT and the project sponsor on a transportation improvement at a national border crossing.

In practice, the entity seeking federal funds will prepare the NEPA document, and other supporting environmental review documents, with guidance from FHWA (as necessary or as requested). FHWA, however, has ultimate responsibility to ensure that a project seeking federal funds will comply with the various laws, regulations, and executive orders applicable to the project. In that capacity, before final approval and project funding, FHWA is required to independently evaluate the necessary environmental documents and review the legal sufficiency of a final EIS⁴¹ or Section 4(f) evaluation.⁴² This review is intended to ensure that the Section 4(f)

⁴⁰ See 40 C.F.R. §1508.16.

⁴¹ 23 C.F.R. §771.125(b). A legal sufficiency review of an EA may be required if FHWA determines that details of the individual project warrant such a review.

⁴² 23 C.F.R. §774.7(d).

evaluation or NEPA document is consistent with legal requirements. It includes a review of the documentation and associated compliance efforts to determine if those efforts are sufficient to assure compliance with applicable law. A separate technical review of the final NEPA/Section 4(f) document is also conducted by FHWA, prior to document approval.

Cooperating and, after SAFETEA, Participating Agencies

The lead agency must consult with and obtain the comments of any federal agency that has “jurisdiction by law or special expertise with respect to any environmental impact involved” in an action that requires an EIS.⁴³ In CEQ’s NEPA regulations, those agencies are identified as “cooperating” agencies.⁴⁴ Pursuant to directive from Congress in SAFETEA, DOT’s NEPA regulations were supplemented to also identify “participating” agencies, which may include any federal and non-federal agencies that may have an interest in the project.⁴⁵

At the request of the lead agency, the cooperating agency is required to assume responsibility for developing information and preparing environmental analyses, including portions of the EIS related to its special expertise. Cooperating agencies are also obligated to provide comments on the NEPA document on areas within their jurisdiction, expertise, or authority. For projects requiring an EIS, that role may be set out in a memorandum of understanding or agreement between the agencies. The lead agency is also required to request comments from appropriate state, local, or tribal agencies; any agency that has requested to receive EISs on similar actions; and the project applicant.⁴⁶

CEQ regulations specify requirements for inviting and responding to comments on the draft EIS (including requirements that specify a cooperating agency’s duty to comment on the draft).⁴⁷ The lead agency is required to consider those comments and respond in one of the following ways:

- modify proposed alternatives, including the proposed action;
- develop and evaluate alternatives not previously considered;
- supplement, improve, or modify its analyses;
- make factual corrections in the EIS; or
- explain why the comments do not warrant further response from the lead agency, citing the sources, authorities, or reasons that support its position.⁴⁸

As illustrated in the choices listed above, the lead agency is not precluded from moving forward with a project if it explains why a cooperating agency’s comments do not warrant further response. However, FHWA suggests that every reasonable effort be made to resolve interagency

⁴³ 42 U.S.C. §4332(2)(C).

⁴⁴ 40 C.F.R. §1508.5.

⁴⁵ Specific only to DOT’s NEPA requirements, “participating” agencies for federal highway projects are defined at 23 C.F.R. §771.107(h) as a state, local, tribal, or federal agency that may have an interest in the proposed project and have accepted an invitation to participate in the environmental review process.

⁴⁶ 40 C.F.R. §1503.1.

⁴⁷ 40 C.F.R. §1503.

⁴⁸ 40 C.F.R. §1503.4.

disagreements on actions before processing the final EIS. If significant issues remain unresolved, the final EIS shall identify those issues and any consultation or other effort made to resolve them.

Some highway projects have involved disagreements regarding the appropriate authority and extent of involvement of coordinating agencies in the NEPA process. For example, in 2003, Transportation Secretary Norman Mineta requested CEQ Chairman James Connaughton to clarify the role of lead and cooperating agencies in developing EIS statements of project purpose and need statements.⁴⁹ Secretary Mineta cited the sometimes lengthy interagency debates over those statements as a cause of delay in highway project development. In his response, Chairman Connaughton referred to CEQ regulations specifying that the lead agency has the authority and responsibility to define a project's purpose and need. Further, Chairman Connaughton referenced previous federal court decisions giving deference to the lead agency in determining a project's purpose and need. Chairman Connaughton's letter also quotes CEQ's regulations, citing the lead agency's "responsibilities throughout the NEPA process for the 'scope, objectivity, and content of the entire statement or of any other responsibility' under NEPA."

Public Involvement

To meet NEPA's goal applicable to public participation in federal decision making, CEQ's regulations require agencies to provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform public stakeholders.⁵⁰ DOT procedures extend beyond those established under CEQ regulations to reflect requirements applicable to "public hearings" established under Title 23.⁵¹ For example, EAs do not need to be circulated, but must be made available to the public through notices of availability in local, state, or regional clearinghouses, newspapers, and other means. Depending on a state's public involvement procedures (approved by FHWA), a public hearing may or may not be required for projects that proceed with an EA. Pursuant to DOT regulations implementing NEPA, documentation necessary to demonstrate compliance with Title 23's public hearing requirements (e.g., public comments or hearing transcripts) must be included in the final EIS or FONSI, as applicable.

Stakeholders that comment on surface transportation projects may be expected to vary depending on a project's impacts. They may include individuals or groups who may benefit from or be adversely impacted by the project, or special interest groups with concerns about the project's impacts on certain affected environments. For example, a highway project that involves upgrading existing roadways may involve construction activities that would affect adjacent homes or businesses. The project may elicit comments from the local business community (e.g., individual businesses, the Chamber of Commerce, or local development organizations) or area homeowners. A project that may affect sensitive environmental resources, such as wetlands or endangered species, may generate comments from local or national environmental organizations.

If a member of the public has concerns about a project's impacts, comments may be directed at virtually any element of the NEPA process or related documentation. Someone may disagree with the definition of project's purpose and need discussion, the range of "reasonable" alternatives

⁴⁹ Text of Secretary Mineta's May 6, 2003, letter, and Chairman Connaughton's May 12, 2003, response, are available at <http://www.environment.fhwa.dot.gov/guidebook/Ginterim.asp>.

⁵⁰ 40 C.F.R. §§1500.2(d), 1506.6.

⁵¹ 23 U.S.C. §128.

selected for consideration and analysis, or the identified level of significance of the project's impacts (e.g., a FONSI was issued when the individual felt an EIS should have been required). Issues that arise during the public comment period may also be the subject of legal action. Critics of NEPA charge that those who disapprove of a federal project will use NEPA as the basis for litigation to delay or halt that project. Others argue that litigation results only when agencies do not comply with NEPA.⁵²

Actual litigation played a prominent role in NEPA's early implementation. However, it may be the *threat* of litigation that affects its current implementation. The number of NEPA-related lawsuits filed annually against FHWA is low.⁵³ Still, the potential threat of litigation may result in an effort to prepare a "litigation-proof" NEPA document. This may be the case particularly for projects that are costly, technically complex (potentially requiring compliance with multiple environmental laws), or controversial (e.g., opposed by or individuals affected by the project or groups that anticipate adverse impacts to resources of concern to them). Some look at this positively, asserting that the fear of a lawsuit makes agencies more likely to adhere to NEPA's requirements. Others counter that the threat of litigation may lead to the generation of wasteful documentation and analyses that do not add value to, and slow, decision making.

Demonstrating Compliance with Additional Requirements

Unlike NEPA, which will apply in some way to all federally funded highway projects, additional environmental requirements applicable to a project will depend on site-specific conditions and potential impacts to resources at the site. For example, what and how requirements may apply to a project will depend on its effect on water quality, water resources, and land use as well as community, visual, noise, or social impacts, to name a few. While a wide array of requirements may apply to federally funded highway projects, certain federal requirements apply more commonly than other requirements. Also, certain compliance requirements have been identified by transportation stakeholders as those more likely to delay the environmental review process (see surveys and studies listed in **Appendix**). The most commonly applicable laws, and selected compliance requirements, are listed in **Table 4**.

⁵² Plaintiffs have generally cited some inadequacy in the NEPA documentation as the basis for filing NEPA-related lawsuits (see CEQ's *Litigation Surveys* for each year from 2001 to 2009 on its "NEPA Litigation" web page at http://ceq.hss.doe.gov/legal_corner/litigation.html). They may charge, among other things, that an EIS or EA did not include sufficient analysis of all project alternatives, did not consider all "reasonable" project alternatives, did not adequately analyze the effects of project alternatives, or that an EA was prepared when an EIS should have been (i.e., a FONSI was issued when impacts were in fact significant).

⁵³ From 2001 to 2009, NEPA-related lawsuits filed annually against FHWA ranged from a low of three to a high of 12; see CEQ's *Litigation Surveys* cited in footnote 52.

Table 4. Federal Law Commonly Applicable to FHWA-Approved Projects

Federal Law	Selected Compliance Requirements
Section 4(f)	For projects that would use a 4(f) resource, an evaluation or a determination of <i>de minimis</i> impacts must be prepared (see the discussion regarding "Preservation of parklands" in the "Requirements Applicable to Federal-aid Highways" section). The evaluation or <i>de minimis</i> impacts determination requires some level of consultation with or concurrence from the official with jurisdiction over the resource (e.g., the Department of the Interior's U.S. Fish and Wildlife Service (FWS); federal, state or local park authorities; or the designated SHPO).
Section 106 of the National Historic Preservation Act	For projects that may affect a site included, or eligible for inclusion, in the National Register of Historic Places, FHWA must consult with the Advisory Council on Historic Preservation (ACHP) or the designated SHPO to determine impacts to the site and seek ways to avoid, minimize, or mitigate adverse impacts. Affected parties must be involved in mitigation plans.
Endangered Species Act (Section 7)	FHWA must prepare a biological assessment when the presence of threatened or endangered animals or plants is suspected to occur in the vicinity of a project. FHWA must consult with the federal agency of jurisdiction (FWS or the Department of Commerce's National Marine Fisheries Service (NMFS)) that will issue a biological opinion on whether the proposed action would jeopardize the continued existence of listed species, or destroy or adversely modify their designated critical habitats.
The Clean Water Act (Section 404)	Requires that the discharge of dredge and fill materials into navigable waters of the United States be done in accordance with review and permitting procedures administered by the Corps, under guidelines developed by EPA. Other federal agencies potentially involved in permit evaluation process include FWS or NMFS.

Source: Congressional Research Service, taken from requirements listed in FHWA's "Summary of Environmental Legislation Affecting Transportation," at http://www.fhwa.dot.gov/environment/env_sum.htm.

Note: This is not intended to be an exhaustive list of federal requirements potentially applicable to federally funded highway projects or a complete description of potentially applicable compliance requirements established pursuant to each law. However, the selected requirements illustrate the potential need to obtain permits or consult with agencies outside DOT. Further, federal laws selected for listing in this table represent those identified by transportation agency officials as a common source of delay in completing the environmental review process.

As illustrated by the requirements listed in **Table 4**, when a federal highway project involves regulated impacts to certain resources, an agency with jurisdiction over that resource may be required to provide some level of analysis, consultation, or approval before a project can proceed. Resulting consultation or approval may include directive(s) to the project sponsor regarding how or whether the proposed project may use the resource. These requirements can lengthen the time it takes to complete the overall environmental review process, if outside agency opinions, input, and/or evaluations are required before the NEPA review can be completed. Whether such requirements will lead to project delays could depend on a host of factors such as whether the project sponsor anticipated the need for outside agency approval or the workload of the agency processing the approval.

To integrate the NEPA compliance process and avoid duplication of effort associated with a project's overall environmental compliance obligations, CEQ's NEPA regulations specify that, to the fullest extent possible, agencies must prepare the NEPA documentation concurrently with any other environmental requirements. The appropriate NEPA documentation should demonstrate compliance with all applicable environmental requirements. It must indicate any federal permits, licenses, and other approvals required to implement the proposed project. This means that compliance requirements of any additional environmental laws, regulations, or executive orders must be identified (but not necessarily completed) during the NEPA process. If full compliance is not possible by the time the final NEPA document is prepared, the document should reflect

consultation with the appropriate agencies and provide reasonable assurance that the requirements will be met.

Environmental Reviews and Project Development

To understand how the environmental review process may affect project delivery, it is useful to understand how the process fits into overall project development, as well as the challenges associated with measuring each stage of that development. It is also useful to recognize root causes of delay in completing the environmental review process, as well as how the process can lead to more efficient project development.

Stages of Project Development

Federal-aid highway funds are generally apportioned to each state by FHWA for the construction, reconstruction, and improvement of highways and bridges on eligible highway routes, and for other special-purpose programs. Individual state DOTs are responsible for determining how and on which projects those funds will be spent. In making that determination, multiple activities and decisions occur from the time a tribal or state DOT, metropolitan planning organization, or local program agency (such as a municipal public works agency) identifies a transportation-related need and a project addressing that need is constructed.

Each stage of project development is initiated and completed largely at the local, tribal, or state level, with ultimate project approval at the federal level—from FHWA for federally funded highway projects. Although the names and details of each step may vary from state to state, they generally include project planning, preliminary design and environmental review, final design and right-of-way acquisition, and project construction. Activities common to each phase of the project development process, including maintenance activities that may take place after project construction, are described in **Table 5**. The table also identifies potential environmental compliance obligations that may occur in each stage of project development.

Table 5. Stages of Federal-Aid Highway Project Development

Common Project Activities and Environmental Compliance Obligations in Each Phase of Development

Project Phase	Description/Common Activities	Common Environmental Compliance Obligations
Planning	Transportation program or project planning involves a cooperative process designed to foster involvement by all users of the planned system—such as the business community, community groups, environmental organizations, the traveling public, freight operators, and the general public. During this stage, a proactive public participation process is conducted by the metropolitan planning organization (MPO), state DOT, and transit operators. Among other activities, MPOs and state DOTs identify current and projected future transportation problems and needs, and analyze, through detailed planning studies, various transportation improvement strategies to address those needs. They also develop long-range plans and short-range programs for alternative capital improvement and operational strategies for moving people and goods.	Efforts have been made, in both FHWA guidance and statutory directive from Congress, to link statewide and metropolitan planning to the environmental review process. For example, Section 6001 of SAFETEA requires the development of long-range transportation plans to include consultations with resource agencies responsible for land-use management, natural resources, environmental protection, conservation, and historic preservation, which may involve comparisons of resource maps and inventories; discussion of potential mitigation activities; and participation plans that identify a process for stakeholder involvement.
Preliminary design and environmental review	A project applicant identifies the preliminary engineering issues, such as proposed alignment of roadways, costs, and project details. This stage includes preliminary engineering and other activities and analyses, such as topographic or metes and bounds surveys, geotechnical investigations, hydrologic or hydraulic analysis, utility engineering, traffic studies, financial plans, revenue estimates, hazardous materials assessments, and general estimates of the types and quantities of materials and other work needed to establish parameters for the final design.	An applicant for federal-aid funds must determine the appropriate NEPA document to be prepared and identify various resources potentially affected by a proposed project and its alternatives. The final NEPA document must identify and demonstrate compliance with any other applicable environmental requirement, to the maximum extent possible, including completing necessary environmental or engineering studies, outside agency coordination or approvals, and public involvement.
Final design and right-of-way acquisition	Final construction plans and detailed construction specifications for the selected project alternative are prepared. If necessary, property appraisals and the acquisition of rights-of-way (ROW) or property to mitigate environmental impacts are made. Property acquisition that may involve the relocation of residents and businesses must be done in accordance with the Uniform Act of 1970. Also, if necessary, utilities are relocated. Project costs are finalized.	Property or material purchases cannot proceed until the NEPA document is approved by FHWA. Property acquisitions must be completed in compliance with requirements identified in the document. If late changes to the project are required, the environmental review process may have to be revisited if design changes result in unanticipated or previously unidentified environmental impacts.

Project Phase	Description/Common Activities	Common Environmental Compliance Obligations
Construction	The state DOT, or other project sponsor, requests and evaluates bids, and awards contracts. Project construction must reflect decisions made during the planning, environmental review, and design stages of project development.	Necessary permits or other compliance requirements identified during environmental review must be in place. Mitigation measures must be complete (e.g., installation of noise barriers or implementation of wetland mitigation). If elements of the project change, the environmental review process may have to be revisited if changes result in unanticipated environmental impacts.
Maintenance	Although not considered part of project development, the majority of projects funded under FHWA-approved programs involve activities that may be broadly described as "maintenance." Highway maintenance may include modernization through roadway resurfacing, restoration, rehabilitation, reconstruction, or adding shoulders or auxiliary lanes. Bridge maintenance may include rehabilitation, reconstruction, or replacement.	Identifying, planning, and implementing necessary maintenance activities are likely initiated and carried out at the local level, with state DOT approval. Maintenance activities would commonly involve a CE determination as well as an assessment of impacts that may require compliance with additional environmental requirements (e.g., impacts to historic sites or structures or endangered species habitat).

Source: Congressional Research Service, based on a review of state DOT practices.

Frequently, "environmental review" is considered synonymous with "NEPA compliance." That is not the case. However, completion of the NEPA compliance process and the overall environmental review process are linked by DOT's requirement that a project cannot be approved and subsequent stages of project development cannot proceed until the project sponsor appropriately documents compliance with NEPA and other applicable environmental requirements.

Challenges in Measuring Stages of Project Development

There are distinct activities associated with each stage of project development. However, the following factors make it difficult to estimate the time it takes to complete each stage:

- Most state and local transportation agencies do not maintain a centralized source of data tracking the time it takes to complete transportation projects. Further, there is no acceptable measure of when a project is delivered in a timely manner versus delayed. A project or a stage of its development may be considered "delayed" if it took the project sponsor longer than anticipated.
- Most state and local transportation agencies do not attempt to extract and measure the time it takes to complete individual activities attributable to a single stage of development (e.g., activities categorized distinctly as applicable to "environmental review"). Further, tracking that data may be difficult since elements of one phase may overlap with another (e.g., project planning activities may include elements of environmental review) and a distinct start and end point of individual activities may be difficult to identify.
- Project development may start, stop, and restart for reasons unrelated to environmental compliance. For example, EIS preparation may begin with publication of a NOI, but preparation may stop and restart due to changes in state

priorities, funding availability, or a host of other issues unrelated to NEPA. In such cases, the time between issuing a NOI and ROD are an inaccurate measure of the NEPA process.

- Differences between state DOT project development processes make it difficult to establish a nationally applicable measure of project development stages. Also, the influence of tribal- or state-specific environmental compliance requirements makes it difficult to isolate the time it takes to comply with federal requirements.

Considering these points, it is difficult to determine either the time it takes to meet specific elements of the environmental review process (e.g., NEPA compliance or agency consultations under the Endangered Species Act) or the degree to which completing the process delays project delivery. Further, it is not possible to assert, with any degree of accuracy, broad, nationally applicable values to the time it takes to complete the environmental review process. For example, there are no data available to substantiate a statement such as “environmental compliance accounts for X% to Y% of surface transportation project development time,” or “compliance with NEPA or Clean Water Act permitting requirements delays X% to Y% of projects for X to Y months/years.” Instead, it may be possible to determine “bridge reconstruction or rehabilitation in state A takes from X to Y months/years” if state A is one that tracks such information.

Also, it may be generally stated that the time it takes to deliver larger, more complex or controversial projects takes longer to complete than is typical for the majority of FHWA-approved highway projects (e.g., maintenance and rehabilitation projects). In addition to taking longer to complete due to their potential cost, size, and complexity, they will likely require compliance with more state, tribal, and federal requirements and may generate more public interest or opposition.

In 2002, the General Accounting Office (GAO) released a report that attempted to determine the typical amount of time it takes to complete overall project delivery as well as individual phases of project development for certain federally funded highway projects.⁵⁴ Data for this report were compiled based on the professional judgment of FHWA staff, staff of state departments of transportation, and transportation associations. According to FHWA, planning, gaining approval for, and constructing federally funded major highway projects that involved new construction typically took from nine to 19 years from planning to construction. FHWA estimated that the preliminary design and environmental review phase for those projects typically took from one to five years, depending on the complexity of the design and possible environmental impacts that must be considered.⁵⁵ It was noted that projects studied in the GAO report included those that would typically require an EIS and represent a small percentage of federally funded projects. It was also noted that, while there are many reasons new highway construction projects may take a long time to complete, most studies on project delivery focused only on the timely resolution of environmental issues to improve project completion times, rather than examining all aspects of project development.⁵⁶

⁵⁴ U.S. General Accounting Office (now the Government Accountability Office), *Highway Infrastructure: Preliminary Information on the Timely Completion of Highway Construction Projects*, September 19, 2002.

⁵⁵ In addition to information from FHWA and state DOT staff, this report also looked at the time it took and the steps necessary to complete six new highway construction projects in California, Florida, and Texas (the largest in the state, in terms of federal funds received, and a randomly selected “medium-sized” project).

⁵⁶ Consistent with the factors that make it difficult to measure individual phases of project development, discussed above, GAO noted that federal and state governments do not maintain information centrally (or, in some cases, at all) (continued...)

Causes of Delay in Completing Environmental Reviews

Although the extent to which the environmental review process may delay project delivery is unclear, it is generally not disputed that the time it takes to demonstrate compliance with environmental requirements can be time-consuming, particularly in cases where EIS preparation is required. Also, while transportation agency officials may cite elements of the environmental review process as a source of frustration or delay, it is not clear what specific environmental compliance requirements currently and routinely lead to project delays or the root cause of those delays.⁵⁷ For example, a common complaint among transportation agency officials is that outside agencies (including FHWA review and approval of the final NEPA documents) do not provide necessary input or approval in a timely way. However, there is little information available that clearly indicates *why* that may be the case on anything other than a project-specific level.

Few studies have looked at the root causes of project delay directly attributable to the environmental review process. Available studies have looked at a limited number of major new construction projects that required an EIS. By their nature, those projects involve unique project-specific issues and are likely to involve complex design, engineering, and compliance issues. Causes of delay for those projects more likely represent the exception and not the rule.

A 2003 FHWA study that attempted to identify causes of delay in completing EISs was unable to identify common factors or conditions that directly or indirectly affected the time it took to complete the NEPA process.⁵⁸ Although timing varied by broad geographic region, it did not seem to vary in relation to the majority of other variables considered (e.g., the presence of certain “controversial issues” or the required participation of agencies outside DOT). Instead, it was observed that the time it took to complete the NEPA process may have been more affected by external social and economic factors associated with broad geographic regions of the country.⁵⁹

Subsequent, albeit limited, study data and anecdotal evidence regarding individual projects also point to factors external to environmental reviews as those most likely to delay the process. In particular, causes of delay in completing environmental reviews arise primarily from potentially overlapping local and project-specific issues including, but not limited to, the following:

- **Local issues**—the project’s level of priority among others proposed in the state; changes in funding availability; concerns of local property owners; or opposition to the project (which may or may not be connected to environmental issues).

(...continued)

on the time it takes to complete highway projects. GAO also noted that there was no accepted measuring stick with which to gauge whether project performance is “timely.” To make its determination on project timing, GAO relied on a best estimate prepared by FHWA. According to FHWA, the estimate it provided to GAO was based on the professional judgment of its staff and several state DOTs.

⁵⁷ The identification of factors that currently affect project delivery is particularly relevant when considering legislative options to address potential causes of delay in the environmental review process. State DOTs have improved their environmental review procedures in the past 10 years. Also, FHWA has expanded its efforts to provide information and guidance on the process, including increased efforts to encourage states to implement programmatic agreements applicable to NEPA compliance and other environmental laws.

⁵⁸ Federal Highway Administration and the Louis Berger Group, *Evaluating the Performance of Environmental Streamlining: Phase II*, 2003, available on FHWA’s “Streamlining/Stewardship” website, <http://www.environment.fhwa.dot.gov/streamline/baseline/phase2rpt.asp>.

⁵⁹ *Ibid.*, under “Conclusions 4.2.”

- **Project-specific issues**—the project’s technical complexity; changes in project scope or design; lawsuits or the threat of litigation (which may or may not be connected to environmental issues); poor consultant work; issues with city documentation; issues with new alignment or coordination with other transportation projects; or land use planning issues.⁶⁰

As discussed previously, environmental requirements identified as a source of delay have been associated with selected requirements established under Section 4(f); the Endangered Species Act; the National Historic Preservation Act; and the Clean Water Act. If a project is delayed by requirements under those laws, that delay may be attributable to project-specific issues.

Efforts to identify specific problems or causes of delay in meeting requirements other than NEPA have found differing perceptions among resource agency and transportation agency officials. For example, in completing its obligations as part of the environmental review process, resource agencies have identified poor communication, problems with the project’s alternative analysis, being given incorrect or incomplete information, disagreements or differences of opinion among agencies, or environmental or biological issues associated with the project. Transportation agency officials also cited disagreements or differences of opinion and environmental or biological issues associated with the project, but identified a lack of timely response from resource agencies as the primary problem.⁶¹

Benefits to the Environmental Review Process

When there is debate over potential options to expedite the environmental review process, that process may be viewed as simply an obstacle to overcome before a highway or bridge project can be built. Benefits to the process may be overlooked or hard to quantify. Potential benefits may generally be thought of as those associated with balancing transportation and infrastructure needs with environmental protection and community concerns. However, one benefit that is not often considered is the degree to which the environmental review process may ultimately save time and reduce overall project costs by identifying and avoiding problems in later stages of project development. A study prepared for the Transportation Research Board made this point when evaluating causes of delay in the construction phases of development.⁶²

Among other findings, the study found that certain recognized management principles, identified as relevant to timely completion of highway construction projects, should be applied by state highway administrators and contractors. It found that adherence to these principles was often inconsistent and lacking, usually resulting in construction delays. Among the principles identified was the “Cost-Time Relationship,” under which, the study found,

⁶⁰ Factors listed here are those that have been most commonly identified in surveys or studies conducted by FHWA and GAO, as well as selected university and transportation organizations. For a list of the surveys and studies used to prepare this report, see **Appendix**. Those surveys and studies have looked primarily at causes of delay applicable to projects that require an EIS.

⁶¹ See “FHWA/Gallup Study on Implementing Performance Measurement in Environmental Streamlining,” available at http://environment.fhwa.dot.gov/stmlng/gallup_05-07.asp.

⁶² Thomas, H.R. and Ellis, R.D., *Avoiding Delays During the Construction Phase of Highway Projects*, Transportation Research Board, National Research Council, October 2001, NCHRP 20-24(12). Also see “The Root Causes of Delays in Highway Construction,” a summary of the study’s findings submitted for presentation by the authors at the TRB annual meeting in 2003, available at http://www.ltrc.lsu.edu/TRB_82/TRB2003-000646.pdf.

More time spent in design identifying problems will reduce construction time and result in a shorter overall project time. A widely recognized principle is that spending more monies during planning and design will reduce the time and cost required for construction by avoiding unforeseen conditions, reducing to a minimum design errors and omissions, and developing schemes that will support the most efficient approach to construction. In the design phase, the opportunity to make decisions to influence the final project cost is greatest. Yet, the expenditure of project funds is comparatively minimal, typically about 10% of the capital budget.⁶³

These study findings illustrate the potential problem with considering time spent in the planning or preliminary design stage as a delay. It is impossible to determine whether or how much time may be *saved*, and project delivery ultimately accelerated, by avoiding conditions identified early in the process.

Expediting Environmental Reviews

Lessons Learned

The potential for the environmental review process to expedite project delivery is illustrated in findings of a 2009 peer exchange between representatives from state DOTs and FHWA Division Offices. The exchange was intended to identify strategies to more effectively move complex environmental documents through the EIS process.⁶⁴ Participants presented information on projects in their states that had moved through the environmental review process quickly. They highlighted the challenges encountered, methods used to successfully and efficiently navigate the EIS process, and lessons learned from their experience. It was observed that the practices described by state DOTs represented a fundamental shift in the way agencies have conducted environmental reviews over the last 10 to 15 years. Those state DOTs were found to have

embraced innovative and creative solutions to balance transportation and infrastructure needs with environmental protection and community concerns. The environmental review processes for the successful projects ... were conducted in a collaborative and transparent manner, whereby [state DOTs] sought to include stakeholders early and often throughout development of the EIS. Such methods not only lead to a faster completion of the environmental review process, but perhaps more importantly, they result in the delivery of better quality projects, ones that fulfill the transportation needs of communities while maintaining protection of environmental resources at the same time.⁶⁵

One recent event serves as a good example of how environmental compliance requirements can be coordinated efficiently. That event was the reconstruction of the I-35 bridge in Minneapolis after its August 1, 2007, collapse. A new bridge opened just over a year later on September 18,

⁶³ "The Root Causes of Delays in Highway Construction," p. 3.

⁶⁴ *Strategies and Approaches for Effectively Moving Complex Environmental Documents Through the EIS Process: A Peer Exchange Report*, prepared by the John A. Volpe National Transportation Systems Center Research and Innovative Technology Administration, U.S. Department of Transportation for the Office of Project Development and Environmental Review, Federal Highway Administration, January 2009, available on FHWA's "Streamlining/Stewardship" website at <http://environment.fhwa.dot.gov/streaming/eisdocs.asp>.

⁶⁵ *Ibid.*, under "Recommendations for Successful Tools & Techniques."

2008. The timing of that bridge reconstruction led to the question “Why can’t all projects be completed that quickly?”

The answer to this question can be found, in part, in an FHWA study that examined how the key elements of the environmental review process were completed after a bridge collapse.⁶⁶ A primary factor cited in the study was that, in the wake of an emergency, the major causes of surface transportation project delay are absent. The “major causes of delay” identified were a lack of funding or priority in the state for the project; local controversy; interested stakeholder or local opposition; or insufficient political support.⁶⁷ Other potential causes of delay could still apply to emergency projects, including issues with the projects’ complexity, poor consultant work, or the environmental review process.

The FHWA study looked at the Minnesota bridge collapse as well as other projects that involved bridge reconstruction after a collapse. Projects in the study illustrated how efficiently the environmental review process *could be* implemented if the more common sources of delay are absent and environmental review involves efficient interagency cooperation.

Bridge reconstruction for the I-35 project required the same environmental permits that would apply to any bridge reconstruction project of similar scope and scale. Despite the urgency of the project, there was no waiver or exemption from the environmental review or permit requirements. The replacement bridge was widened to accommodate future transit options, but did not increase capacity. The project fit the criteria necessary to be processed as a CE, but still required

- a permit issued by the Corps under Section 404 of the Clean Water Act;
- a bridge construction permit issued by the U.S. Coast Guard;
- an assessment of potential impacts to threatened and endangered species by a consultation team formed by FHWA, Minnesota DOT (MnDOT), and the Department of the Interior’s U.S. Fish and Wildlife Service (FWS);
- a Minnesota Pollution Control Agency permit certifying compliance with the Clean Water Act’s National Pollutant Discharge Elimination System and other requirements; and
- an assessment of potential cultural and historic issues through MnDOT’s Cultural Resources Unit (CRU), in part, in accordance with a programmatic agreement with the Minnesota SHPO and tribes interested in reviewing state projects.

Efficient interagency coordination on the project was a factor identified as one associated with expedited reconstruction of the bridge. However, the efficiency of that agency interaction did not begin with this project. FHWA observed that staff from state and federal agencies involved in the environmental review process had worked collaboratively on past projects. The agencies established lines of communication and understood the tasks and concerns of each other’s

⁶⁶ See “Meeting Environmental Requirements After a Bridge Collapse,” prepared for the Office of Project Development and Environmental Review, Federal Highway Administration, U.S. Department of Transportation, and prepared by the John A. Volpe National Transportation Systems Center Research and Innovative Technology Administration, U.S. Department of Transportation, August 2008, available at http://www.environment.fhwa.dot.gov/projdev/bridge_casestudy.asp.

⁶⁷ Major sources of project delay cited in the bridge study are those identified in FHWA survey results included in **Appendix**.

agencies. Those existing relationships led to a quick response among those agencies after the bridge collapse. Further, FHWA and MnDOT recognized that by limiting the scope of the project, the environmental review process was expedited because no expanded environmental review was needed (e.g., it met the criteria applicable to a CE). Further, federal and state resources were focused on this project—its completion was a priority to the state.

Apart from issues cited in the FHWA bridge study, MnDOT cited its use of a design-build procurement process as an important factor in the expediting project completion. A “design-build” process brings designers and contractors together early in the project development process and allows for a shortened process completion time by overlapping design and construction.⁶⁸

Lessons learned from projects completed relatively quickly as well as suggested solutions from transportation agency officials⁶⁹ involve certain common approaches or procedures that have or could streamline the environmental review process. Those approaches include the following:

- efficient interagency communication and project coordination;
- early and continued communication with stakeholders affected by a project;
- improvements in internal processes and procedures;
- demonstrated agency commitment to priority projects and project schedules; and/or
- programmatic approaches to meeting compliance obligations.

Each of these approaches can be implemented under existing standards and requirements applicable to federally funded highway projects. For example, CEQ and DOT regulations implementing NEPA include explicit requirements intended to identify potential environmental issues early in the project development process and coordinate efficient interagency cooperation. CEQ also provides federal agencies with guidance on improving the efficiency and timeliness of their environmental reviews under NEPA.⁷⁰ DOT provides guidance and information intended to assist state and local agencies in implementing the environmental review process more efficiently.⁷¹

⁶⁸ For more information about the bridge reconstruction project, see the Minnesota DOT “I-35W St. Anthony Falls Bridge” website at <http://projects.dot.state.mn.us/35wbridge/index.html>.

⁶⁹ See findings in the 2007 FHWA/Gallup study (cited in footnote 61).

⁷⁰ CEQ guidance “Improving the Process for Preparing Efficient and Timely Environmental Reviews under the National Environmental Policy Act,” released on March 6, 2012, available at <http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/efficiencies-guidance>. CEQ stated that the guidance is part of its broader effort to “modernize and reinvigorate” federal agency implementation of NEPA and to support goals established in President Obama’s August 31, 2011, memorandum, “Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review.” For information about CEQ pilot programs established to support those goals, see <http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/nepa-pilot-project>.

⁷¹ See FHWA’s online “Environmental Review Toolkit,” available at <http://environment.fhwa.dot.gov/index.asp>. It includes, for example, guidance and information regarding linking project planning and environmental requirements; NEPA requirements applicable to project development; a database of “lessons learned” related to streamlining and environmental stewardship; and guidance on compliance requirements such as those applicable to wetlands, Section 4(f), and historic preservation.

Administrative Efforts

In 2009, DOT initiated its “Every Day Counts” program to identify and implement approaches to shortening project delivery (among other goals). The program includes an evaluation of potential changes in DOT’s role in implementing the environmental review process, including the following efforts:

- **Improve the link between project planning and environmental review**—sets up a framework for incorporating planning documents and decisions from the earliest stages of project planning into the environmental review process.
- **Enhance legal sufficiency reviews**—uses the process to identify the most common problems in NEPA and Section 4(f) document development, their root causes, and the measures local and state transportation agencies can take to avoid the problems; and encourages reviews when documents are in their draft stage, reducing the potential need for multiple legal reviews of a “final” document and helping to resolve conflict and potential controversy earlier in the process, when project schedules can better accommodate the change.
- **Expand the use of programmatic agreements**—identify new and existing programmatic agreements that may be expanded to a regional or national level.
- **Encourage the use of existing regulatory flexibility**—clarify existing requirements applicable to activities that may be allowed during the preliminary design phase of development and to ROW acquisition and utility relocation.

These issues identified by both DOT and state transportation agencies illustrate the need to more efficiently implement existing requirements or to identify barriers to implementing them.

Conclusions

There is little debate that delays in transportation project delivery can result in higher project costs, as well as delay potential positive economic advantages such as bringing project-related jobs to the community. Also, it is known that completing the environmental review process takes time, sometimes years for complex, major projects. Meeting environmental compliance requirements may result in project delays or, at least, a project taking longer than anticipated by its sponsor. However, what is unclear is whether or what specific elements of the environmental review process routinely delay project delivery.

The time it takes to complete the NEPA process is often the focus of debate over project delays attributable to the environmental review process. However, the influence of environmental requirements established under Title 23 and other federal law call into question the degree to which changes in the NEPA process will expedite the environmental reviews and accelerate project delivery. Further, although there are no comprehensive data and available information tends to be anecdotal, when delays in the environmental review process have been identified, they primarily stemmed from local or project-specific issues (e.g., project complexity, changes in state priorities, or late changes in project scope).

Regardless of potential changes to the NEPA process or the overall environmental review process, local factors will strongly influence project delivery time. State or local decision makers will continue to have the most significant influence on project delivery in their capacity to establish

(and change) project priorities, allocate available funds, and be influenced by local controversy or project opposition. A project's environmental review process may be efficiently executed and involve no delays in the process itself, but still take decades or never be completed if local and state issues are acting against the project.

The potential success of efforts intended to expedite the environmental review process would involve evidence that transportation projects were delivered more quickly. However, considering the limits to measuring the time it takes to complete the environmental review process, the relative success of a particular approach may be gauged in terms of the degree to which state or local transportation agencies find it useful in meeting their environmental compliance obligations.

Compared to transportation planning and project development during construction of the Interstate Highway System, state and local transportation agencies are more inclined to consider a project's effects on communities and resources. Apart from any potential changes to federal environmental review requirements, local and state agency decisions regarding transportation project planning, funding, and development will continue to be strongly influenced by a project's benefits and adverse effects to the environment and the community it serves.

Appendix. Surveys and Studies Applicable to the Environmental Review Process

In this report, summary information and conclusions regarding factors applicable to measuring the stages of project development, the time it takes to complete the environmental review process, and primary sources of delay or perceptions among transportation agency officials regarding causes of delay in completing the environmental review process were drawn from data included in the following surveys and studies conducted by FHWA, GAO, universities, or transportation organizations:

Federal Highway Administration (available on FHWA's "Environmental Toolkit: Streamlining/Stewardship—Performance Reporting" website, <http://environment.fhwa.dot.gov/streaming/es10measures.asp>).

- *Evaluating the Performance of Environmental Streamlining: Phase II, an FHWA-commission study conducted by the Louis Berger Group, 2003.*
- FHWA surveys, *Reasons for EIS Project Delays and Information on Timeliness on Completing the NEPA Process.*
- *Strategies and Approaches for Effectively Moving Complex Environmental Documents Through the FIS Process: A Peer Exchange Report*, prepared for FHWA by DOT's John A. Volpe National Transportation Systems Center Research and Innovative Technology Administration, January 2009.
- *FHWA/Gallup Study on Implementing Performance Measurement in Environmental Streamlining*, "Implementing Performance Measurement in Environmental Streamlining," May 2007.

Government Accountability Office.

- *Highway Infrastructure: Stakeholders' Views on Time to Conduct Environmental Reviews of Highway Projects*, GAO-03-534, May 23, 2003.
- *Highway Infrastructure: Preliminary Information on the Timely Completion of Highway Construction Projects*, GAO-02-1067T, September 19, 2002.

University and Transportation Organization Studies.

- *What Influences the Length of Time to Complete NEPA Reviews? An Examination of Highway Projects in Oregon and the Potential for Streamlining*, by Jennifer Dill, Center for Urban Studies, Nohad A. Toulon School of Urban Studies & Planning, Portland State University, submitted for presentation at the 85th Annual Meeting of the Transportation Research Board, November 15, 2005 (revised).
- *Causes and Extent of Environmental Delays in Transportation Projects*, prepared by TransTech Management, Inc., for the American Association of State Highway and Transportation Officials (AASHTO), December 2003.
- *Environmental Streamlining: A Report on Delays Associated with the Categorical Exclusion and Environmental Assessment Processes*, prepared by TransTech Management, Inc., for AASHTO, October 2000.

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D. C. 20503

July 23, 2012
(House Rules)

STATEMENT OF ADMINISTRATION POLICY

H.R. 4078 – Regulatory Freeze for Jobs Act of 2012

(Rep. Griffin, R-AR, and 20 cosponsors)

The Administration is committed to ensuring that regulations are smart and effective, that they are tailored to advance statutory goals in the most cost-effective and efficient manner, and that they minimize uncertainty. H.R. 4078, the Regulatory Freeze for Jobs Act, would undermine critical public health and safety protections, introduce needless complexity and uncertainty in agency decision-making, and interfere with agency performance of statutory mandates. Accordingly, the Administration strongly opposes House passage of H.R. 4078.

When a Federal agency promulgates a regulation, the agency must adhere to the robust and well understood procedural requirements of Federal law, including the Administrative Procedure Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, the Paperwork Reduction Act, and the Congressional Review Act. In addition, for decades, agency rulemaking has been governed by Executive Orders issued and followed by administrations of both political parties. These require regulatory agencies to promulgate regulations upon a reasoned determination that the benefits justify the costs, to consider regulatory alternatives, and to promote regulatory flexibility.

This Administration is committed to a regulatory system that is informed by science, cost-justified, and consistent with economic growth. Through Executive Order and the direction of the President, agencies must also ensure that they take into account the consequences of rulemaking on small businesses. Executive Order 13563 requires careful cost-benefit analysis, increased public participation, harmonization of rulemaking across agencies, flexible regulatory approaches, and a regulatory retrospective review. Through Executive Orders 13579 and 13610, the Administration also has taken important steps to promote systematic retrospective review of regulations by all agencies. Collectively, these requirements promote flexible, commonsense, cost-effective regulation.

Passage of H.R. 4078 would seriously undermine the existing framework. H.R. 4078 would also add layers of procedural burdens that would interfere with agency performance of statutory mandates, unnecessarily delay important public health and safety protections, and undermine and potentially delay important environmental reviews. For example, H.R. 4078 would create excessively complex permitting processes that would hamper economic growth. It would also spawn excessive regulatory litigation, and introduce redundant processes for litigation settlements. It also addresses numerous problems that do not exist, such as a moratorium on "midnight" rules.

In these ways and many others, the Regulatory Freeze for Jobs Act would impede the ability of agencies to protect public health, welfare, safety, and our environment, as well as to promote economic growth, innovation, competitiveness, and job creation.

If the President were presented with H.R. 4078, his senior advisors would recommend that he veto the bill.



EXECUTIVE OFFICE OF THE PRESIDENT
COUNCIL ON ENVIRONMENTAL QUALITY
WASHINGTON, D.C. 20503

April 24, 2012

The Honorable Howard Coble
Chairman
House Committee on the Judiciary,
Subcommittee on Courts, Commercial and Administrative Law
517 Cannon HOB
Washington, DC 20515

The Honorable Steve Cohen
Ranking Member
House Committee on the Judiciary,
Subcommittee on Courts, Commercial and Administrative Law
517 Cannon HOB
Washington, DC 20515

Dear Chairman Coble and Ranking Member Cohen:

I am writing to you to provide the Council on Environmental Quality's (CEQ) views on H.R. 4377, the "Responsibly and Professionally Invigorating Development Act of 2012." Although the bill purports to streamline environmental reviews, we believe the legislation is deeply flawed and will undermine the environmental review process. If enacted, these changes could lead to more confusion and delay, interfere with public participation and transparency, and hamper economic growth.

The National Environmental Policy Act (NEPA) was signed into law by President Richard Nixon after passing Congress with overwhelming bipartisan support. NEPA ushered in a new era of citizen participation in government, and it required the government to elevate the consideration of the environmental effects of its proposed actions. It remains one of the cornerstones of our Nation's modern environmental protections.

NEPA is as relevant and critical today as it was in 1970. NEPA focuses and informs decision makers, policy makers, and the public on alternatives and the tradeoffs involved in making decisions. Today, we take for granted that governmental decision making should be open, that government actions should be carefully thought out and their consequences explained, and that government should be accountable. Prior to the enactment of NEPA, this was not the case. H.R. 4377 would undo more than four decades of transparent, open, and accountable government decision making.

The Administration believes that America's economic health and prosperity are tied to the productive and sustainable use of our environment, and the President has stressed these principles since his first day in office. NEPA remains a vital tool for the Nation as we work to protect our environment and public health and revitalize our economy.

The President also takes seriously the need for efficient permitting and decision making by Federal agencies. American taxpayers, communities and businesses deserve nothing less. However, we reject the notion that NEPA and other Federal environmental laws and regulations hinder job creation.

For example, the Federal Highway Administration (FHWA) has found that 96.5 percent of federally funded highway projects are approved under the least intensive, shortest and quickest layer of NEPA analysis, namely categorical exclusions (CEs). CEs can take as little as a few days to a few months to complete, not years, and are usually done concurrently with other aspects of the project review process so that the entire review process is completed quickly. Only 0.3 percent of FHWA projects require a full environmental impact statement (EIS), the most detailed study under NEPA. When there are project delays, they are typically caused by incomplete funding packages, local opposition, and low local priority, or compliance with other laws and requirements considered during the NEPA process, but rarely NEPA itself.

We continue to identify new ways to improve agency decision making and new opportunities to improve efficiency and reduce delays. On March 22, 2012, President Obama signed an Executive Order directing Federal agencies to expedite regulatory review and permitting decisions for key infrastructure projects – a critical step in improving our Nation's infrastructure and maintaining our competitive edge. In addition, CEQ has taken several steps to improve and make more efficient Federal agency decision making (see attachment for CEQ NEPA Modernization Initiatives).

H.R. 4377 would make a number of considerable changes to Federal agency regulatory review, permitting and environmental analysis that undercut the core principles embodied in NEPA, including reasoned decision-making and public involvement. The legislation seeks to implement these changes to Federal agency decision making under the Administrative Procedure Act (P.L. 79-404). The passage of this legislation would lead to two sets of standards by which Federal agencies would be expected to comply, one for "construction projects" under the APA and one for all other federal actions, such as rulemaking or planning, under NEPA. This would lead to confusion, delay, and inefficiency.

Moreover, the legislation would direct agencies, upon the request of a project sponsor, to adopt State documents if the State laws and procedures provide environmental protection and opportunities for public involvement "that are substantially equivalent to NEPA." In our view, it is difficult to determine whether a State statute is substantially equivalent to NEPA and the legislation contains no requirement for agencies to determine if the State documents are adequate for NEPA purposes. More importantly, the State document may have looked at a different purpose and need for the project, a different set of alternatives than the Federal agency would have looked at, and relied on different standards for analysis. The State, for example, may not have looked at the same factors that Federal agencies are required to consider, such as

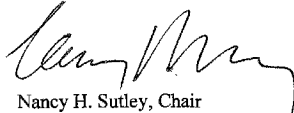
environmental justice and wetlands protection. Finally, no two State processes are alike, compounding confusion for projects that cross State lines. Thus, a Federal agency's reliance on State documents may lead to inconsistencies between Federal projects and agencies, different environmental goals and protections, confusion among the public and unclear results for businesses and permittees.

The legislation also establishes arbitrary deadlines for the completion of NEPA analyses. Factors such as feasibility and engineering studies, non-Federal funding, conflicting priorities, or applicant responsiveness are just a few examples of delays outside of the control of an agency. Arbitrary deadlines and provisions that automatically approve a project if the agency is unable to make a decision due to one of the factors described above will lead to increased litigation, more delays and denied projects as agencies will have no choice but to deny a project if the review and analysis cannot be completed before the proposed deadlines.

These comments illustrate a few of the many concerns we have with the legislation. The Administration would be happy to provide the Committee with a more thorough and exhaustive list of our substantive concerns with the legislation at the request of the Committee.

In closing, when properly implemented, NEPA improves collaboration, consensus, accountability and transparency surrounding government decision making and actions. Our Nation's long-term prosperity depends upon our faithful stewardship of the air we breathe, the water we drink, and the land. Our country has been strengthened by the open, accountable, informed and citizen-involved decision-making structure created by NEPA, and our economy has prospered.

Sincerely,



Nancy H. Sutley, Chair
Council on Environmental Quality

cc: Chairman Lamar Smith
Ranking Member John Conyers, Jr.

Enclosure

CEQ NEPA Modernization Initiatives

April 24, 2012

- In May 2010, CEQ issued guidance on Emergencies and NEPA that addressed how agencies can ensure efficient and expeditious compliance with NEPA when agencies must take exigent action to protect human health or safety and valued resources in a timeframe that does not allow sufficient time for the normal NEPA process. This guidance also addressed how agencies, in any situation including emergencies, can develop focused and concise Environmental Assessments (EAs) to provide an expeditious path for making decisions when the proposed action does not have the potential for significant impacts.
 - In November 2010, CEQ finalized guidance on how to establish and use CEs for activities—such as routine facility maintenance—that do not need to undergo intensive NEPA review because the activities do not individually or cumulatively have significant environmental impacts. The CE guidance reinforced the value of categorical exclusions.
 - In January 2011, CEQ issued guidance on the use of mitigation and clarified the appropriateness of using mitigation to conclude Environmental Assessments with a Finding of No Significant Impact (FONSI). A mitigated FONSI allows agencies to use EAs to identify and commit to mitigation measures that, when implemented, will eliminate potential significant impacts and meet NEPA requirements without the need to prepare a more intensive Environmental Impact Statement (EIS).
 - In March 2011, CEQ initiated a NEPA Pilot Program to solicit ideas from Federal agencies and the public about innovative time- and cost-saving approaches to NEPA implementation. Under this process, CEQ is working to identify innovative approaches that reduce the time and costs required for effective implementation of its NEPA regulations. These innovative approaches promote faster and more effective Federal decisions on projects that create jobs, grow the economy, and protect the health and environment of communities. We expect that this effort will result in faster and more effective Federal decisions on projects that create jobs, promote economic growth, and protect the health and environment of communities.
 - In March 2012, CEQ issued new guidance for public comment on improving the efficiency of the NEPA process overall, by integrating planning and environmental reviews, avoiding duplication in multi-agency or multi-governmental reviews and approvals, engaging early with stakeholders, and setting clear timelines for the completion of reviews.
-

Mr. BACHUS. That will not take away from your 5 minutes either. So we will start the clock. Everybody has gone over their 5 minutes. So there is really no such thing as 5 minutes.

Mr. JEFFRIES. Well, Mr. Chair, we all appreciate your southern hospitality.

Mr. Kovacs, I want to explore sort of a narrative that has been put forth today as it relates to the recession and then the slow, in the words of others, economic recovery subsequent to the collapse of the economy in 2008. And certainly I think most reasonable people would agree that the economic recovery has not been as robust as we all would like for the good of the people that we represent.

It has been an uneven recovery, but certainly it seems to me, based on objective criteria, that corporate America has been a disproportionate beneficiary of the recovery to the extent that there has been one of significance subsequent to the collapse of the economy. Is that a fair statement?

Mr. KOVACS. I do not really do that kind of economic analysis. I am sorry. I cannot help you.

Mr. JEFFRIES. Okay. But would it be fair to say that part of your concern related to the permit process is that it hinders the ability of American companies to be successful? Is that not the genesis of your report and the reason why you are sitting before us today?

Mr. KOVACS. Well, I think the essence of the report says that there are projects that the private sector—and I know there are projects especially in the transportation field that the Government sector would like to do, and we think that it would enhance job creation and enhance the economy if they could move forward more quickly.

I think that the statistics—and you were not here when I went over like on the American Recovery Act. One of the statistics that is really amazing that the Administration puts out is that out of the 192,000 projects that went through the Recovery act, 184,000 of them had to go through the Boxer-Barrasso Amendment which is use the most expeditious route possible under NEPA. And so if they had to use the full-blown NEPA versus the Barrasso-Boxer Amendment, the question is how many of those would have stalled out.

And my only point is that I think if you listen to all the panelists, you look at where they are in the Senate, look at where they are in the House, there is an enormous amount of agreement that we have to get the time frame right and things have to move quicker. And I don't think—

Mr. JEFFRIES. And I would agree with that. Reclaiming my time, I would agree with that concern as it relates to the time frame and making sure it is appropriate both in terms of its rigorousness but not unnecessarily hindering the opportunity for innovation and entrepreneurship and businesses to move forward.

Now, am I correct that the stock market currently is at or near record highs? Is that a fair, factually accurate statement that you are qualified to answer?

Mr. KOVACS. It is certainly doing better than it was several years ago.

Mr. JEFFRIES. And am I correct that corporate profits are at or near record highs presently?

Mr. KOVACS. Actually, you would have to ask our economist. I think he would be the better person.

Mr. JEFFRIES. Okay, I think that is a generally accepted fact.

Am I correct that the productivity of the American worker is at an all-time high or certainly has increased dramatically over the last several years, meaning that companies are in a better position to make more using the same or less employees? Is that a factually accurate statement?

Mr. KOVACS. Well, I think productivity has increased for centuries based on technology, new materials, everything.

Mr. JEFFRIES. Okay. So I think that the doom and gloom scenario, as has been painted, related to the economy and the Obama recovery would do well to take into account some of the objectively understood facts as it relates to who actually has benefitted during this recovery, particularly in the context of this discussion where we all are legitimately concerned about the success of American companies moving forward. But that success and whatever regulatory obstacles exist I think should be interpreted in the context of the fact that corporate America is doing pretty well right now, but it is the middle class, working families, poor folks, seniors who have struggled in the context of this recovery.

Mr. KOVACS. But, Congressman, the jobs that would have been created had these projects gone forward would have gone to the middle class. I mean, these would have been high paying construction jobs. And I think the purpose for us doing Project No Project and being so actively involved in the permitting issue is it will create jobs. The U.S. Chamber wants to create as many jobs in this country as we can possibly create. And our position is not that jobs have not been created. Our position is we can create a lot more and we can take the people who are either unemployed or have part-time jobs and put them in full-time jobs through these projects. And I think all of us have agreed that these projects need to go forward in a more expeditious way, and if they do, they will create jobs. And that is what we should be working for.

Mr. JEFFRIES. I think we can all find the point of agreement as to the end of creating jobs for those that we represent here in America. The best means to do so—we will have to continue that debate.

But I thank you, Mr. Chairman, and I yield back.

Mr. MARINO [presiding]. Thank you, Mr. Jeffries.

Distinguished Congressman, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

I think that we all would agree that a sustainable environment is a key to economic prosperity. Do you all agree? Is there anyone who does not agree?

[Nonverbal response.]

Mr. JOHNSON. So a sustainable environment—I mean, we are talking about air quality, water quality, things such as that. Those things are important to economic prosperity. Are they not? Do you all agree?

[Nonverbal response.]

Mr. JOHNSON. And so now, when we have scientists who are studying the impact of man's activities on our environment with an eye toward determining whether or not those activities are sustain-

able or not, should we not pay any attention to those kinds of studies? Is there anyone who would agree that we should just discard those studies?

[Nonverbal response.]

Mr. MARINO. If the gentleman would yield for a moment, I want to go on record that I absolutely agree with you that we should make certain that our environment is protected, and I think I have reiterated that numerous times. So I do not think you are going to get anyone here to disagree with you.

Mr. JOHNSON. Well, I do not know, though. I do want to just make sure that I can get an affirmation by a show of hands.

[Show of hands.]

Mr. BACHUS. Mr. Kovacs too, all right. Thank you, my colleagues on the other side.

And so when 95 percent or so of scientists agree that man's activities contribute to the diminution of our environment from a quality perspective, I mean, we should pay attention to that. And so when 95 percent of them are saying that man creates the—or mankind—man's activities contribute to global warming and global warming is a real concern, then we should, as a society, pay close attention to that.

Now, Mr. Kovacs, I know that you have taken positions in opposition to the scientific research that has been done. Do you have any scientific reason for taking those kinds of positions on this issue of global warming?

Mr. KOVACS. That is not a correct statement, sir.

Mr. JOHNSON. What is not a correct statement? That you have taken—

Mr. KOVACS. That I have taken positions in opposition. The U.S. Chamber has consistently supported finding a way in which to reduce greenhouse gases without destroying the economy.

Mr. JOHNSON. Will the Chamber of Commerce consider not blocking alternative forms of energy creation such as wind and solar?

Mr. KOVACS. Well, Congressman, I thought I answered this the last time. But we have for—I do not know—15-16 years before even a lot of the renewable fuels became popular with the environmental community, we supported renewable fuels. We supported energy efficiency. We supported energy savings performance contracts. We are sitting here next to Cape Wind. I do not know. When was the first time we supported your project? 10 years ago?

Mr. DUFFY. Probably 10 years.

Mr. KOVACS. So, I mean, I think on that ground I just beg to differ with you. I think you are just wrong.

Mr. JOHNSON. Well, I mean, I am looking back as early as 2001 when you appeared on CNN on behalf of the Chamber and claimed that there is no link between greenhouse gases and human activity. I mean, that is just a fact.

But then even up to 2009, I see that you challenged an EPA decision about clean air and you pledged to put the science of climate change on trial kind of like a Scopes Monkey Trial of the 21st century. There was a comment that was attributed to you in 2009.

Mr. BACHUS. Not the part about the Scopes Monkey Trial.

Mr. JOHNSON. Oh, okay.

Mr. BACHUS. That was your comment. Right?

Mr. JOHNSON. And even today the Chamber continues to take or make exaggerated claims that regulating greenhouse gases would eliminate jobs and strangle the economy. And you are spending millions of dollars in a campaign against meaningful climate change legislation. And so I do not know how you can square what your activities have been over a period of at least 12 years—

Mr. KOVACS. Well, I can honestly tell you that if funds had been spent in opposition to climate change, whether they be advertising or anything else, it would have come out of my division. And I can tell you for a fact there has not been any money put up by my division to oppose climate change legislation.

Mr. JOHNSON. That is a very technical and artful way of escaping responsibility, I think, for the Chamber's efforts—

Mr. KOVACS. No. This is, I guess, where you and I just really have a fundamental disagreement. If you go back through the pages of what the Chamber has supported, we have promoted technology. We have promoted energy efficiency. I mean, when President Obama decided to have a major event on energy efficiency contracts and it was going to be a major event, he was going to issue an executive order, he was going to have President Clinton there with him, who was the only CEO that he asked to appear with him? It was Tom Donohue, and they all promoted the energy efficient savings contracts. So certainly if we had the positions that you are espousing, I do not think that President Obama would have invited our CEO to that event.

So I think we are very proud of all of the efforts. Go ask Congressman Welch. We have been with him in the beginning on his energy efficiency bill. We have been there on all the energy efficiency bills. I think there is probably one we did not, but virtually on all of them. So I think we have been pretty consistent.

We may disagree with you on some of the bills. As I said to you last time, we did disagree with Waxman-Markey. We thought that the regulatory structure was so oppressive that it would literally sink the economy, and the economy was already bad at that time. But we have always left ourselves open to coming to some kind of a position where we can balance the economy and the environment and make sure that we do not sink the economy through regulations.

Mr. JOHNSON. Well, do you think that regulations are due in such an important area such as the environment? Environmental regulations are basically what the Chamber has traditionally attacked.

Mr. KOVACS. We have historically said that this Nation needs reasonable regulation. We have never argued with that. If you did not have regulation, we would have to probably create it just to have business practices. The question is between 1946 and today we worked on a few small regulations. Today we are on regulations that are massive costing tens of billions of dollars, and I think the concern there is let's understand what it is we are doing because it does have an effect on jobs and we just need to appreciate that.

Mr. JOHNSON. Well, you seem to be a very reasonable person, Mr. Kovacs, and I look forward to working with you in good faith to try to do something good for our environment and, at the same time, promote prosperity for the businesses.

Mr. KOVACS. We are there on that one.

Mr. JOHNSON. And I thank you.

Mr. MARINO. Thank you, Mr. Johnson.

Just for the record, I want to refer to a portion of Mr. Kovacs' report, and I quote. One of the most surprising findings is that it has been just as difficult to build a wind farm in the U.S. as it is to build a coal-fired power plant. In fact, over 40 percent of the challenged projects identified in our study were renewable energy projects. And we did ask some renewable people to be here and they chose not to be here.

For my good friend, Mr. Johnson, where I live, it is not only humans that get blamed for the gases. It is our cows as well.

The Chair recognizes the Chairman.

Mr. BACHUS. Mr. Ivanoff, I just would like to make one closing comment. You were talking about the jobs that are created, not just building the road, the project. I went back and what I was reminded of recently—they came out with the truck sales of General Motors and Ford and Dodge. And the largest consumer was the construction industry, and not all of them in road construction. But I looked up where these trucks are made, the largest customer for these factories. In Dearborn, Michigan, that is the F150 and a smaller factory in Kansas City. They are all made there. How about the Avalanche and the Silverado? Flint, Michigan; Fort Wayne, Indiana; Grand Rapids, Michigan. The Ram, Warren, Michigan. So a lot of jobs in a lot of—Fort Wayne, Indiana; Dearborn, Michigan; Zanesville, Ohio; Warren, Michigan. Every one of those is probably a high unemployment area. A lot of people. They are there. They want to work hard. They are very good paying jobs.

So I commend the gentleman from Pennsylvania for bringing this.

I close by saying everybody has commented. The studies are going to be done. They are just going to be done quicker. Mr. Duffy, there are people that waited 12 years for that job. A lot of them did not have 12 years.

So I yield back the balance of my time.

Mr. MARINO. Votes are going to be called shortly. But, Mr. Johnson, do you have anything further that you would like to discuss?

Mr. JOHNSON. Yes, I do, Mr. Chairman, and I do appreciate it.

I know that in your testimony, Mr. Duffy, in the paragraph numbered 2 in the first paragraph thereunder, the last sentence, you are talking about the Federal regulatory process and you state in that last sentence: "Indeed, the Chairman of our opponents' group recently admitted in the press that his strategy is one of 'delay, delay, delay.'" And you point that out in your comments. Is that correct?

Mr. DUFFY. That is correct, Mr. Johnson. That is the chairman of our organized opponents' group made that statement recently in CommonWealth magazine.

Mr. JOHNSON. And your chairman is in fact Bill Koch. Is that correct?

Mr. DUFFY. That is correct. That is the statement of Mr. Koch.

Mr. JOHNSON. But actually in that statement that you pulled from Mr. Koch stated that he is—he says he is pursuing two Cape Wind strategies. "One is to just delay, delay, delay, which we are

doing and hopefully we can win some of these bureaucrats over. End quote. He says, quote, the other way is to elect politicians who understand how foolhardy alternative energy is.”

So Mr. Bill Koch we know is just a strong and unstinting opponent of alternative energy, and I know that his activities in terms of electing persons who are of that same mindset is an activity that the U.S. Chamber of Commerce has participated in as well.

And I just want to point—I do want to place a copy of Mr. Koch’s statement, which is in an article which is entitled “The Man Behind Cape Wind and the Project’s Biggest Opponent Have Been Negotiating Privately for More Than a Decade.” It is by Bruce Mohl, M-o-h-l. I would like to submit this for the record without objection.

Mr. MARINO. Without objection.

[The information referred to follows:]

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Look who's talking

The man behind Cape Wind and the project's biggest opponent have been negotiating privately for more than a decade

BY: BRUCE MOHL
 PHOTOGRAPHS BY: J. CAPPUCCIO/MARK RANDALL
 ISSUE: SPRING 2013
 April 09, 2013

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AFTER SPENDING 12 YEARS and \$65 million trying to bring wind turbines to Nantucket Sound, Jim Gordon thinks the end of his struggle is in sight. "This is the year," he says in February at a Boston conference attended by about 150 offshore wind industry officials from around the world. Gordon is cautious by nature, careful not to get ahead of himself in a struggle that has assumed Sisyphian proportions. But in front of a crowd that is counting on Cape Wind to become the nation's first offshore wind farm, he offers reassuring words. The nation's only commercial offshore wind lease is safely in his back pocket, along with all of the state and federal permits he needs. President Obama and Gov. Deval Patrick are firmly on his side. And Gordon says he is making progress in arranging construction financing for the project with the Bank of Tokyo and the federal Department of Energy.

All that remains is a handful of lawsuits in Washington challenging federal government approvals of the wind farm. Gordon tells the audience the lawsuits don't have any merit, but it's clear he's also worried about the "coal billionaires" behind the litigation and the potential for delay. He doesn't mention the billionaire's name, but everyone in the room knows he is talking about Bill Koch, the flamboyant Florida businessman who opposes Cape Wind because he doesn't want to look at it from his Osterville summer home. Koch has plowed more than \$5 million into a group opposing Cape Wind, pursuing a strategy of "delay, delay, delay" in an effort to bleed Gordon financially until he gives up and walks away.

Cape Wind has become a symbol in the national debate over climate change, but the project itself has become a test of wills between Gordon and Koch, two 1 percenters with radically different views of the country's energy future. Most news coverage of their long-running feud focuses on the actions of their surrogate lawyers, advocacy groups, and public relations people. What few people realize is that the 59-year-old Gordon and the 72-year-old Koch are on a first-name basis. In lengthy, separate interviews, they reveal that they have known each other since the 1990s, and been arguing about Cape Wind in private chats on the phone and in person for more than a decade. Koch, interviewed by phone, calls Gordon "a very good entrepreneur and a brilliant marketer." Gordon, interviewed in person at his Boston office, calls Koch "a very amiable guy, an interesting guy." Gordon courts Koch relentlessly, trying to win him over with logic, facts, money, and even veiled threats. Nothing has worked. Like the stalled national debate over climate change, the Gordon-Koch talks are going nowhere. Yet the two men keep talking.

Fittingly, Koch and Gordon first met in the mid-1990s on the ocean. Koch, the winner of the America's Cup in 1992, recruited the first all-women team to compete for the Cup in 1995. As the team was preparing, Koch learned that Gordon was selling an interest in two natural gas-fired power plants he built in the 1980s. Koch was interested in investing. To get to know Gordon better, he invited him to Newport, Rhode Island, to watch the sailing team practice. Gordon smiles, remembering the day. He says he spent an afternoon on board a sailboat with Koch and a handful of other guests and attended a party later that night at a

home Koch was renting. Some of the other party guests included Dennis Connor, known as Mr. America's Cup for his four victories, and many members of the sailing team, including Shelley Beattie, who was known as Siren on the TV show *American Gladiators*. "I didn't grow up in that milieu of Newport, so it was an interesting way to spend an afternoon," Gordon says. "I felt like I was kind of watching a movie." Gordon ended up selling a stake in his power plants to GE Capital, so he and Koch didn't talk again until 2002, when Gordon, trying to build support for Cape Wind, reached out to his fellow energy entrepreneur. At the time, Gordon says he knew little about Koch other than that he ran an energy business, liked to sail, and had a place on Cape Cod. On the phone, Gordon says he gave Koch an overview of Cape Wind; Koch responded by inviting Gordon to have dinner with him on the Cape so they could discuss the wind farm further.

Gordon remembers driving down to Osterville and pulling up to the checkpoint for the private Oyster Harbors Club, a very exclusive enclave that is home to assorted Moltons and DuPonts. It seemed promising that a ceremonial windmill sat next to the guard shack.

Gordon is a wealthy man, with more than \$150 million in personal investments and a \$4 million townhouse on Beacon Hill located a block away from Secretary of State John Kerry's home in Louisburg Square. But Gordon is not in the same league financially as Koch, who is worth \$4 billion and ranked No. 320 on the Forbes list of the wealthiest people on the planet. (Koch's more conservative brothers, Charles and Davis, are tied for sixth at \$34 billion each.) Koch runs Oxbow Corp., an energy company that mines and markets coal, petroleum coke (a byproduct of oil refining), steel, and natural gas with more than \$4 billion in sales and 1,100 employees. Koch is an avid collector of fine wines, fine art, nautical gear, and western memorabilia. He owns a home in Palm Beach and is building a complete western town on land he owns near Aspen, Colorado, where he plans to play host to his wife's extended family, his six children (four of whom are 16 or under), and various customers and suppliers. His sprawling Cape Cod land holdings, including his long-time summer place called Homeport, carry an assessed value of nearly \$33 million.

Koch showed Gordon around the grounds of his waterfront property, pointing with pride to the Fernando Botero statues dotting the lawn and taking him down to the massive wine cellar modeled after the captain's quarters of the USS Constitution. Gordon remembers the wine collection was so extensive that Koch used a scanner to track what they were drinking that night. Koch also remembers the night. "We had a nice dinner and a nice conversation, some nice bottles of wine," he says.

Afterwards, they retired to a sitting room to talk about Cape Wind. Gordon says he went through his usual presentation, including a visual rendering of what the turbines would look like from shore. "I said, 'Bill, we think this is a good project. It's on a very shallow shoal. It's away from the shipping lanes and the ferry lanes. Here's what it will look like.' I remember when I showed him the visual simulation, he said to me—'I'll never forget—Jim, I'm going to do my own visual simulation and if I don't like the way these things look, I'm going to fight you tooth and nail.'" Gordon says he left that night feeling uneasy. "I sensed that this guy was going to be a problem," he says.

Koch remembers the night a bit differently: "He went through his spiel, his salesmanship on how Cape Wind is so environmentally friendly, global warming, and all that stuff. And I was blunt with him. I said, 'Hey, Jim, I've looked at the alternative energy business. I've used all those BS arguments myself. I know what's really going on here.'" Koch says he felt the project wouldn't work financially unless Gordon landed a big government subsidy or some "fat" power contracts. He also says he told Gordon that the wind farms would be "visual pollution" for him. Koch claims Gordon offered to bring him in as an investor on the project, a contention Gordon denies. Both men say the night ended with Koch still undecided on Cape Wind. Gordon says he and Koch talked several times by phone over the next few years, but had no breakthroughs. In 2005, Koch's position began to harden. He became co-chairman of the Alliance to Protect Nantucket Sound, the group leading the fight against Cape Wind, and the following year he wrote an op-ed piece for the *Wall Street Journal* entitled "Taming at windmills." The article made several assumptions about the type of power contracts and subsidies Cape Wind would need to succeed and concluded the project was a "giant

The 59-year-old Gordon and the 72-year-old Koch have known each other since the '90s and are a first-name basis.

Read the full transcript of the

boondoggle for the benefit of one developer," Gordon responded with his own article, accusing "coal magnate William Koch" of misleading the public. The battle lines were drawn, yet Gordon kept calling and Koch kept picking up the phone.

On one phone call, Koch says Gordon offered to reimburse him all the money he was spending to oppose Cape Wind if Koch switched sides. Gordon declines comment on that conversation. "I'm not going to comment on any confidential negotiations I've had or discussions I've had with him about settlement," he says.

Gordon says he occasionally would visit Koch in Florida when he was visiting his mother, who lives there during the winter. At one meeting at Koch's yacht club in West Palm Beach, Gordon says, he made the case that Cape Wind would reduce the wholesale clearing price of electricity in New England and cut the bills of the region's power customers. Koch wasn't interested. "I told him I was buying more property on the Cape for a family compound and the windmills would interfere with the aesthetics," he says. "In addition to that, they cost too much. They'd up my power bill."

The image of Koch complaining about an increase in his power bill is amusing. His property tax bill alone in Barnstable is nearly \$342,000 a year.



"I sensed that this guy was going to be a problem," Jim Gordon says. Photograph by J. Cappeccio.

made a killing.

As Gordon looked around for the next big thing, he saw an article in the *Boston Globe* about someone who was proposing wind and fish farms off Cape Cod. The wind farm idea intrigued him since it offered the possibility of producing electricity in

interviews with James Gordon and William Koch.

The most recent call between the two men came late last year. Koch says Gordon called to warn him that environmentalists were going to start harassing him for his opposition to Cape Wind and the only way to avoid the pounding was to come out in support of the project. Gordon says his call was more of a heads-up than a warning. "I told him that environmentalists are furious with him and they are," he says. Either way, Koch, who in the past has waged epic battles against his brothers, the state of Massachusetts, the Turkish mafia, and fraudulent wine dealers, isn't backing down. "The environmentalists are already after me," he says. "So bring it on, baby."

GORDON VS. KOCH

Jim Gordon, who grew up in Newton and worked at his father's corner grocery stores during his adolescence, graduated from Boston University in 1974 with a major in broadcasting and the goal of becoming a movie director. Yet he quickly discovered he had a knack for business and a talent for sensing the next big thing in the energy business. While waiting in a gas line in 1975, Gordon says he hit on the idea of starting a company that would help people reduce their energy usage and lessen the nation's dependence on Mideast oil. The company, Energy Management Inc., started by selling energy-saving devices and, over time, began retrofitting buildings to cut their energy consumption. By the late 1980s and 1990s, Gordon was building power plants that ran on wood chips and natural gas. The plants produced electricity in a more environmentally friendly way than existing coal and oil plants. In fact, Gordon boasts that three of his natural gas-fired plants killed off three proposed coal plants. Gordon eventually sold off all of his power plants by 1999 and

Massachusetts that emitted no greenhouse gases, consumed no water, discharged zero waste, diversified the region's energy mix, and had the potential to create local jobs.

Led by Sen. Edward M. Kennedy, Cape Cod elites reacted in horror. They gave all sorts of reasons for their opposition, but it always seemed to boil down to something unsaid: they were in favor of wind power as long as the turbines weren't within sight of their oceanfront compounds. Koch has the courage to admit he doesn't want to look at the turbines. But he also knew a NIMBY argument would never derail Cape Wind, so he began analyzing the project from an economic perspective. He says his analysis was informed by his own past experience trying to sell green energy to customers of Southern California Edison at a premium of 2 cents per kilowatt-hour.

"Over 15 years, guess how much green energy I sold?" Koch asks. "Zero. No one would pay. What that said to me was that California wanted green energy, but homeowners didn't want to pay for it. When it comes to dollars and cents, people want the cheapest energy possible."

The power from Cape Wind, if it ever gets built, won't be cheap. The utility National Grid, prodded by legislation pushed by Gov. Patrick, signed a deal to purchase 50 percent of Cape Wind's output at an initial price of 18.7 cents per kilowatt hour, rising 3 percent a year. At the time, the price was nearly two times the going rate of electricity. In 2012, NStar, the state's other major utility, was trying to win state approval for a merger with Northeast Utilities in Connecticut. Patrick used the leverage of the utility merger to force NStar to accept the same terms as National Grid for 27.5 percent of Cape Wind's output.

Koch describes Cape Wind's utility contracts as "fat—huge, huge, hugely fat." The state Department of Public Utilities acknowledges NStar's customers will pay \$436 million to \$513 million above market rates over the 15-year life of the utility's contract, but concluded that these higher costs were more than offset by such environmental intangibles as the project's size, its location close to energy users, and its advanced stage of development.

Interestingly, NStar in late 2011, just a few months before it agreed to buy Cape Wind power, negotiated renewable energy contracts with three onshore wind farms in Massachusetts, New Hampshire, and Maine. The combined power output of the three wind farms is slightly less than what Cape Wind is offering NStar, but the price is significantly lower—\$111 million below market rates over the 10-year life of the contracts.

"If mankind was worried about CO₂, rather than paying Jim Gordon \$500 million a year and making him wealthy, why don't you plant a helluva lot of trees because trees and bushes take CO₂ and convert it into oxygen," Koch says. "What Jim Gordon is feeding off of is perception, not reality. The perception is that windmills are good because the wind is free. That's a very simple perception, but the reality is putting his windmills up is going to cost a hell of a lot of money that would take away from other purposes, such as feeding our families, getting good medical care, getting a good education, etc."

But what about Cape Wind's potential to slow the march of global warming? Where does the coal billionaire stand on what many consider the environmental issue of our time?

Koch pauses for awhile, and then launches into a long analysis that essentially acknowledges climate change is rapidly occurring but rejects offshore wind turbines as the answer. He says scientists who attempt to predict the pace of global warming cannot take into account all the potential variables, including the possibility that a comet could strike the earth or a volcano could erupt, both of which are potentially climate-changing events. He also talks at length about how the earth and its oceans are constantly adapting to changing environmental conditions.

"In fact, there's a theory called Gaia, which means the earth is always self-adjusting. When something gets out of line, the earth adjusts back to it," he says. "The whole point is we don't know. All mankind can do is adapt."

Adaptation is a central theme of the Gaia theory, developed in the 1970s by British scientist James Lovelock and the late University of Massachusetts Amherst microbiologist Lynn Margulis. The theory holds that living organisms interact with their surroundings on earth to form a self-regulating system that creates the conditions for life on the planet. Lovelock believes climate change is in full swing, brought on by the clearing of forests, carbon emissions, and overpopulation. He is dismissive of most green energy schemes, however, particularly wind power, as too little benefit too late. He favors massive development of nuclear power and a move to high ground to prepare for the rising tide.

"The real Earth does not need saving," he writes in his 2009 book, *The Vanishing Face of Gaia: A Final Warning*. "It can, will,

and always has saved (self), and it is now starting to do so by changing to a state much less favorable for us and other animals."



Bill Koch, one of the wealthiest men on the planet, is an avid collector of fine wines, fine art, nautical gear, and western memorabilia.
Photograph by Mark Randall/MCT/Landov

Gordon believes the Earth does need saving, and he thinks his wind farm can be part of the solution. He also makes no apology for building a project that will yield him a profit. "It's important that people in this industry see that it's not just coal and petroleum coke people that can make money, but renewable energy developers can also make money," he says. "Because if we don't, we're not going to have innovation in this industry and we're not going to have projects two, three, and four."

Gordon bristles at any suggestion that it's too late to combat climate change. "The choice of heading for higher ground is not one I'm willing to accept. I have three children. One is six, one is nine, and I have a 24-year-old. This is the greatest environmental threat," he says. The wind entrepreneur also seems amazed that Koch and many of the other Cape Cod opponents of his project yet occupy waterfront

properties that are likely to be among the first to feel the effects of climate change. "Cape Cod being a low-lying coastal community, it's most susceptible to the impacts of climate change," he says. "There's a biblical irony here. For someone like Bill Koch to fight this project, it is a biblical irony."

COUNTING DOWN THE CLOCK

It's coming down to crunch time for Cape Wind. Gordon must begin construction of his wind farm by the end of 2015 or face losing the contracts he has with National Grid and Northeast Utilities. The time frame seems doable. He has lost everything he needs except a loan for the construction work. Lenders are probably skittish about the pending Washington court appeals related to the project, but if Obama's Department of Energy approves a loan guarantee for the wind farm those concerns are likely to evaporate. "We feel we're in a very good place," Gordon says.

In fact, Gordon is telling Massachusetts electric ratepayers that it's in their self-interest to see Cape Wind begin construction this year. His utility contracts mandate that the price he receives for his power will rise by 2 cents a kilowatt hour if the project is unable to obtain a federal investment tax credit. To qualify for the tax credit, Cape Wind must start construction before the credit expires at the end of this year.

Koch says he is pursuing two Cape Wind strategies. "One is to just delay, delay, delay, which we're doing and hopefully we can win some of these bureaucratic over," he says. "The other way is to elect politicians who understand how foolhardy alternative energy is."

The court appeals in Washington are part of the delay strategy. They challenge Cape Wind approvals granted by the Interior Department, the Fish and Wildlife Service, the Federal Aviation Administration, and the US Coast Guard. The Alliance to Protect Nantucket Sound is footing the bill for all but one of the court challenges. The Alliance is also mobilizing opposition within Congress to giving Cape Wind a federal loan guarantee.

The Alliance hasn't had much success in court, except in the US Court of Appeals for the District of Columbia, a conservative-leaning body that has been caught in a political tug-of-war between Obama and Republicans in Washington. The appeals court has only seven of its 11 justices, and a majority of them were appointed by past Republican presidents. Obama nominees to the court haven't survived the Senate approval process. In 2011, the court ruled the FAA failed to adequately review whether Cape Wind would pose a danger to pilots flying by visual flight rules. It took another year before the FAA affirmed its earlier decision, a ruling that is again being challenged.

Bill Koch

Re. puppy testimony

Charles McLaughlin, the assistant town counsel in Barnstable, which is suing the FAA over its decision, says Cape Wind's opponents have an advantage over Gordon. "We only have to win one of these," he says of the Washington court cases. "He has to win every one."

On the political front, Koch pumped several million dollars into efforts to elect Cape Wind foe Mitt Romney as president, but he hasn't made an effort to influence any races in Massachusetts even though Bay State Republicans generally don't support the wind farm.

Koch seems just as amazed as Gordon that the Cape Wind fight has dragged on so long, but for different reasons. "Christ, this has been delayed for 10 years and any rational guy would have said there's a time value of money and say, 'Why am I doing this?'" says Koch. "He's not that rich a guy to be able to fund it all himself or to even fund the portion of the equity that has to be put up by the investors."

"He's done a masterful job and he's sold a great line of BS. I've really got to compliment him on that," says Koch. "But I think he's made the mistake of falling in love with this project. I don't know how he's ever going to get his money out."

Koch says Gordon keeps calling him but he hasn't been answering lately. He says he may write him a note at some point, explaining his opposition, but he has no plans to give up the fight. "Why should I?" he asks.

Gordon, for his part, says he plans to keep reaching out to Koch. It's what he did with the late Walter Cronkite and state Sen. Dan Wolf of Barnstable, men who were opposed to Cape Wind before he convinced them of the merits of the project. He says he still hopes Koch will come around.

"This isn't a contest," Gordon says. "It's not, does Jim Gordon ultimately win or does Bill Koch ultimately win? The real winner is the environment, it's preserving the environment of Cape Cod, enhancing our health, energy security, creating jobs, and a new industry for Massachusetts. That is what's at stake. This is not a clash of egos. If Bill is leading me on, if that's what he's doing, I've got to go down that path. I've got to go down every path that I can to try to make this project move forward."

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Mr. BACHUS. Well, let me raise an objection which I withdraw.

Mr. MARINO. I take back that without objection.

Mr. BACHUS. I would like the record to show that Congressman Hank Johnson has joined with the Koch brothers in resisting this alternative energy project. So I thought you all were adversaries, but you are obviously doing what you consider the devil's work here.

Mr. JOHNSON. Yes, I mean, there is a place for political activity, and there is a place for good public policy that promotes the general welfare.

Mr. BACHUS. So you are commending the Koch brothers.

Mr. JOHNSON. Well, there is certainly no intent on my part to do that.

Mr. BACHUS. It sure sounded like that is what you—

Mr. JOHNSON. No, no, no, not at all.

Mr. Slesinger, you are grabbing for the mike. I want to give you an opportunity.

Mr. SLESINGER. I just think that, again, this issue with Cape Wind again comes down to not so much it was NEPA but just a very well financed, organized opposition for whatever reason that is the real cause for most of these delays, not NEPA.

Mr. BACHUS. Mr. Duffy was wanting to respond.

Mr. MARINO. Yes. I wanted to give each one of the panel members 15-30 seconds. If you want to wrap something up, please do.

Mr. BACHUS. Maybe they would like to respond to this question and then you could give them time.

Mr. MARINO. Sure, go ahead.

Mr. DUFFY. Just in response, obviously this is a well-funded opposition, but something is wrong with the system if a well-funded opponent can misuse the NEPA system to drag it out for 10 years. As we mentioned before, the original 40 questions estimated a 12-month timeline. We are at 10 years. The CEQ regs today say the text of an EIS shall normally be less than 150 pages or proposals of unusual scope shall normally be less than 30 pages. We, with the Department of Justice and the NRDC, are going to file a brief tomorrow defending the sufficiency of a 5,000-page environmental impact statement. So I think our point is something has gone amiss from the original congressional intent that is reflected in the statute and the original adoptions of guidance from the CEQ to where we are today.

And we just think Massachusetts, with its energy facilities siting statute on a bipartisan basis, has a solution with a strong track record which is worthy of consideration. It imposes a 12-month time limit and an expedited appeal directly to the State's highest court to move projects forward that are worthy of merit.

Mr. JOHNSON. Well, if I may, Mr. Chairman.

Mr. MARINO. Quickly, please.

Mr. JOHNSON. It is indeed clear that something is wrong with our democracy when a couple of deep-pocketed individuals can stall action for this long.

Mr. MARINO. Mr. Slesinger, would you like 15 seconds?

Mr. SLESINGER. I would just note that, again, Cape Wind was a unique case. Because of the very strong and well-financed opposition, it required to, quote, paper the record, which is probably why

the NEPA documents are as long as they are and why we think they are very complete. And that is why we are joining Mr. Duffy's company in supporting that EIS as being sufficient.

Mr. MARINO. Thank you.

Mr. Ivanoff?

Mr. IVANOFF. Thank you very much. First of all, again, thank you very much for giving us an opportunity to speak and come before you.

Mr. MARINO. It is our pleasure.

Mr. IVANOFF. I think, Mr. Marino, you have introduced a very interesting piece of legislation. I wish you well with it. I think it probably needs a little tweaking, as you heard from Mr. Slesinger and others. But I think what it brings is it is a job creation bill and many of these projects that we are talking about—they cannot be outsourced. You cannot pave a grade—do grade paving of a roadway from across the pond. It has got to be done here by our people.

Mr. MARINO. Thank you, sir.

Mr. Kovacs?

Mr. KOVACS. Very quickly. I think this is one of the more constructive hearings I have been at. I saw the most agreement I think I have seen in this Committee in several years, and I am thrilled.

Mr. MARINO. We are trying.

Mr. KOVACS. Really quickly. You know, in the conference report when NEPA was first put out in 1970, they anticipated a 1-year time frame for getting these projects done, and they anticipated at that time the President would do an executive order to make sure it stayed on 1 year.

And also, just because it has been put up several times by Mr. Slesinger, on Project No Project, it really depends what projects you are looking for. Once you get into the Federal stage of the projects, it is NEPA. And if you are a wind project, a solar project, a water project, NEPA is what is going to affect you. So you have to look at it. But the local action starts in the beginning, but believe me, the inability to come to a sufficiency of a NEPA review never ends.

Mr. MARINO. And just for the benefit of my dear friend, Mr. Johnson, I am out in the country. I live on a mountain. I heat my house with propane gas. I live in the middle, dead smack in the middle of Marcellus gas, which is booming our economy. But be that as it may, I am looking in to putting a windmill on my property because I see that energy shooting by every day that I could utilize.

So with that, ladies and gentlemen——

Mr. JOHNSON. Well, if I might, just one more comment.

I always knew that my friend from Pennsylvania was a flaming progressive. [Laughter.]

Mr. MARINO. That was my deceptive intent.

Mr. BACHUS. Hank, let's get behind this bill and stop the Koch brothers from being able to delay a project.

Mr. JOHNSON. To my friend from Alabama, I admire your work and will consider your guidance.

Mr. MARINO. Thank you.

This concludes today's hearing. I want to thank all of our witnesses for attending. I want to thank also our guests for being here as well, and if you have any input, let our staff know. We would appreciate it.

I want to thank my colleagues and our staff members. I think we were very productive here today.

And without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is adjourned.

[Whereupon, at 12:02 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

Response to Questions for the Record from William K. Kovacs, Senior Vice President, Environment, Technology & Regulatory Affairs, U.S. Chamber of Commerce

**Questions for the Record from
Ranking Member Steve Cohen
for the Hearing on H.R. 2641, the “Responsibly and Professionally Invigorating
Development Act of 2013”**

July 11, 2013

Questions for William Kovacs

1. At the beginning of your prepared testimony, you provide a long list of the various initiatives that the current Administration and the Council on Environmental Quality have undertaken this year to improve environmental reviews, including one issued last month.

Rather than pushing for a re-write of NEPA that would only apply to a subset of projects subject to environmental review, wouldn't it make more sense to see how and whether these new initiatives address some of the concerns you have raised?

The U.S. Chamber of Commerce has welcomed each of the initiatives designed to improve the NEPA environmental review process for major projects. We applaud the Administration's efforts to improve the coordination and transparency of project reviews through a “dashboard.” Better coordination and effective communication are key components of improving the review process. The biggest success stories in the area of project coordination, however, have resulted from the type of approach taken in SAFETEA-LU. And a key component of SAFETEA-LU has been the introduction of action-forcing deadlines. These deadlines have led to significantly positive results. The RAPID Act would simply apply these successful ideas to a larger subset of major projects – the type of projects that otherwise could be subject to an open-ended review process with no prospect of closure. The nation cannot afford to wait to see how many worthy projects will die on the vine because of the lack of a predictable conclusion to the review process.

2. According to Mr. Slesinger, hardly any of the examples of delayed environmental reviews cited by the Chamber on its Project No Project Website was attributable to NEPA.

What is your response?

Initially, it is important to note that the criteria and parameters of the Chamber's Project No Project study and website did not call for a specific determination of whether or not NEPA was the source of delay or termination of each project. Consequently, simply because “NEPA” does not appear within a project entry on the website does not mean that a NEPA review did not contribute either directly or indirectly to the delays in the completion of that particular project. Along those lines, while NEPA may not appear to be a contributing factor for the delay of a project, NEPA is in reality the cause. For example, a project may appear to have been delayed and eventually cancelled simply because of financing reasons. Upon further probing, however, it turns out that the

financing was either lost or could not be fully secured because of uncertainties in the environmental review process required under NEPA. It can be difficult for an investor to commit initially or year-after-year to millions of dollars to build a project when construction is delayed by an uncertain, unwieldy, and indefinite environmental review process. For example, in July 2009, the Transmission Agency of Northern California cancelled a northeastern California transmission line project because three of the six partner utilities pulled out their promised investments. One of the reasons cited by the utilities for withdrawing their financing commitments: the potential for costly threatened litigation in connection with the environmental review of the project.

Moreover, as the Chamber itself has asserted, the Not-In-My-Back-Yard (“NIMBY”) attitude opposing project development is pervasive in American society. This obvious fact obscures the truth that the most powerful tool wielded by NIMBY activists to halt or delay projects is NEPA. As the 2012 Congressional Research Service (CRS) report cited by Mr. Slesinger in Question 4 correctly noted, the NEPA compliance process is often used to demonstrate compliance with **all** applicable environmental review requirements: “[t]his use of NEPA as an “umbrella” compliance process can blur the distinction between what is required under NEPA and what is required under separate authority.”¹ The very fact that NEPA is used as an “umbrella” compliance process invites project opponents to use a “throw in the kitchen sink” approach, raising multiple environmental issues that impede any final resolution of the NEPA review. Thus, while some of the projects included in the Project No Project report appear to have been abandoned or delayed because of purely local factors, the essentially open-ended NEPA review process provides the ideal vehicle to raise concerns and force additional study and additional delay. For example, although Mr. Slesinger stated at the July 11 hearing that the Cape Wind project had been delayed for 10+ years because of local opposition and local actions, the project sponsor who actually navigated the process assigned much of the delay to NEPA and its nearly limitless opportunities for new issues to be raised.

3. *Would you support increasing funding for agencies so that they have the resources to conduct such reviews more quickly, including the ability to respond to public comments more rapidly?*

The Chamber could hypothetically support additional appropriated funds to expedite the environmental review process for major projects if the additional funds were restricted to that specific purpose. Congress adopted a conceptually similar approach in Title V of the 1990 Clean Air Act Amendments. States are authorized to impose and collect permitting fees from permit applicants, but these fees are strictly limited to the state agency’s actual cost of conducting the review of permit applications. In the absence of such a restriction, we are concerned that additional funds would immediately be diverted to other activities of interest to an agency.

The Chamber is confident, moreover, that improved coordination and information-sharing will enable agencies to be far more efficient about the way they conduct

¹ Congressional Research Service, *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress* (April 11, 2012) at 5.

environmental reviews. The RAPID Act will enable agencies to expend less effort replicating relevant information about a project that is already in the hands of other federal or state agencies.

4. Mr. Slesinger cited a Congressional Research Service report from last year that found most delays associated with environmental reviews are not caused by NEPA.

What is your response?

Significantly, the CRS report cited by Mr. Slesinger **only** evaluated federally-funded highway projects, not investor-funded development projects of the type that are the primary concern of the Chamber's members. Many of the non-NEPA causes of project delays listed by CRS – lack of state funding, changing state/local priorities – are not relevant to investor-funded projects. Critically, CRS itself acknowledges that it actually has no data on nationwide highway project delays and correspondingly little data on the reasons for these delays. As noted above, many of the “purely local” reasons cited for project delays actually depend on the vehicle of the NEPA environmental review process to slow or kill development projects.

5. If there is only one provision of the RAPID Act that could be enacted, which provision would you want it to be?

In the Chamber's view, the most important aspect of the RAPID Act is the imposition of action-forcing deadlines, including the replacement of the default six-year statute of limitations with a six-month statute of limitations. Our members tell us that the most important concern associated with the current environmental review process is its total lack of certainty and predictability. Holding the agencies accountable to complete their reviews within a defined deadline will give project sponsors the certainty they need in planning for major projects.

6. If it was guaranteed that one provision of the RAPID Act would be struck, which would you rather it be?

The Chamber has been a longstanding proponent of permit streamlining, including last year's RAPID Act. We believe that all provisions of the current bill are important. For the purpose of responding to your question, however, and in the spirit of cooperation, the Chamber could support the elimination of the default issuance provisions of the draft bill. With deadlines for agency action, project sponsors have a remedy available to ensure that the environmental review process is concluded.

**Response to Questions for the Record from Dennis J. Duffy,
Vice President and Counsel, Cape Wind Associates, LLC**

**Questions for the Record from
Ranking Member Steve Cohen
for the Hearing on H.R. 2641, the “Responsibly and Professionally Invigorating
Development Act of 2013”**

July 11, 2013

Question for Dennis Duffy

Q: You mentioned a number of suggestions for Congress in your written testimony, but you did not mention the RAPID Act as a whole as one of them. Do you support the RAPID Act as drafted? If not, what changes would you make?

A: I strongly support the principles included in HR 2641, the RAPID Act, and urge all parties to recognize that this bill is not a partisan attempt to “gut” NEPA or any substantive standard or protection under our environmental laws, but a much needed refinement of the NEPA process, which in many instances – such as our experience – has gotten out of control.

NEPA is desperately in need of constraints. Congress never intended that the NEPA process would cause unending years of delay or allow well-funded NIMBYs to wreak havoc on our energy development; it was designed to give all parties an opportunity to review and assess environmental impacts of a project and take a “hard look” before proceeding. The RAPID Act would streamline NEPA to eliminate endless delays pursued by parties with no purpose other than delay. It would continue to provide all agencies and all interested parties their full rights, but with a more coordinated process and within reasonable time frames.

As I noted in my testimony, many of the provisions of HR 2641 are similar to those of the Massachusetts Energy Facilities Siting Act (“MEFSA”), which imposes a time limit on the review process for major energy projects and provides a “one-stop” approval process, with a single appeal to be brought directly, and in a timely manner, to the highest court of the Commonwealth. The MEFSA was adopted in 1973 with bipartisan support and has withstood the test of time. I would urge the Committee to consider adding similar provisions for consolidating and expediting all federal appeals relating to a particular project, and I referenced in my testimony several examples of such provisions in existing law applicable to natural gas projects.



**Response to Questions for the Record from Scott Slesinger,
Legislative Director, Natural Resources Defense Council**

**Questions for the Record from
Ranking Member Steve Cohen
for the Hearing on H.R. 2641, the “Responsibly and Professionally Invigorating
Development Act of 2013”**

July 11, 2013

Questions for Scott Slesinger

1. *Mr. Kovacs discusses the Chamber's Project No Project Website which identified various examples of delayed environmental reviews.*

Are there examples on the Project No Project website that may demonstrate that NEPA is not the problem in causing delays?

Of the 351 examples on the Chamber's website, over 300 do not even mention NEPA. The Chamber provides no causality with the status of projects and NEPA. The argument that this site is a reason for gutting NEPA simply does not exist. I will list a few of the many examples from their site that fail to show any nexus with NEPA.

*“Broad Mountain Development Co. LLC initially acquired a permit, from an individual zoning officer, to construct and operate a 27-windmill farm within a Woodland-Conservation (W-C) zoning district. The Butler Township Zoning Hearing Board later revoked the permit after local citizens intervened within the legal deadline, ruling that the permit officer did not have the authority to issue the permit because wind turbines are not allowed within Woodland-Conservation zones. Both trial and a unanimous appellate court upheld the zoning board's decision to revoke the permit based on the project's improper usage of W-C zoning law.” **This is a case of zoning law change, not NEPA.***

In January 2007, *Secure Energy* purchased a 24-acre site and building from Caterpillar Inc and announced plans for a coal-gasification plant that would convert up to 1.4 million tons a year of Illinois coal into pipeline quality natural gas. The developer projected plant construction cost at \$800 million and estimated it would create approximately 86 full time jobs, 330 union construction jobs, 140 new coal mining jobs, and 90 new trucking jobs in the Decatur area.

Secure Energy was awarded an air permit by the Illinois EPA in April 2007 and the plant was scheduled to be operational by 2009. However, financing proved to be an issue for this project. Private investment apparently proved insufficient. In April, 2009, the State of Illinois allocated \$14 million for the plant under the Illinois Coal Revival Program. In July 2009, the U.S. Department of Energy informed Secure Energy that it would not provide \$647 million in loan guarantees as the company and a bipartisan, bi-state coalition of Senators and Representatives had requested. As of

November, 2010, the website for the plant remains live, but notes that “The design of the plant was changed in Jan. of 2010 to gasoline.” **The problem was financing, not NEPA; the air permit was granted in only 4 months.**

“In 2003, the Calpine Corporation sought to build a liquefied natural gas (LNG) terminal on *Humboldt Bay in Eureka, CA*. The Eureka City Council held a meeting to consider the project; over 1,000 residents showed up and of the 77 who spoke, 59 opposed the project. In response, a Calpine spokesperson said “We have withdrawn our plans... It became clear a majority of the community did not support the project, and community support for a project is very important to us.” **Local opposition, not NEPA, caused the project to get dropped.**

“*The Golden Pass LNG Terminal* was proposed in 2003. FERC, in conjunction with the U.S. Coast Guard, the U.S. Army Corps of Engineers, the Texas Commission on Environmental Quality, and others, approved its permit in 18 months. Construction started in 2006, but Hurricane Ike damaged the terminal in 2008, delaying completion until 2010—5 years after FERC finished its analysis. As the Chamber of Commerce’s website says, Golden Pass’s main delay “came from natural causes.” **A hurricane, not NEPA, caused the project to fail.**

These examples are from the Chamber website; it does not include independent research or confirmation of the facts by NRDC.

2. *Do you have any recommendations about how NEPA could be improved?*

If the Congress wants agencies to work more expeditiously on the NEPA process and related permits and provide more useful reports, Congress needs to adequately fund those who prepare environmental reviews as well as those who oversee contractors. Agencies should be encouraged to follow the example of the Department of the Interior’s Smart from the Start program -- for example, the Bureau of Land Management program setting out a roadmap for development of renewable energy projects on public lands that provides data and analyses on a broad – high scale – level and should ease the preparation of NEPA reviews for site- and project-specific actions. Following the lead of the Federal Highway Administration’s Eco-Logical, an ecosystems approach to developing infrastructure projects is another practical way to improve planning process and NEPA that could be more widely adopted.

3. *Mr. Kovacs notes that there is bipartisan support for streamlining the permitting process for federal construction projects and that this suggests that there ought to be bipartisan support for the RAPID Act.*

What is your response?

That there may be some Republicans and Democrats who think the permitting process takes too long does not mean this bill is a good solution. Most Americans would not support a “fix” that undermines environmental reviews and short circuits the public’s ability to have a say in federal

government actions that affect their lives and communities. There is also support in Congress to conduct proper environmental analyses before the federal government funds or approves projects to avoid waste—particularly given the current state of the economy. The fact that some members may want to expedite decisions for projects they support is expected, but cannot come at the expense of the public's say in federal projects that affect their lives and communities. Automatic permit approvals, limited alternatives analysis, absurdly short comment periods for the public are precisely the type of modifications to NEPA that will *actually* cause delays, while wasting money, encouraging bad projects, and probably eroding the public's right to open government.

4. *Mr. Kovacs says that the RAPID Act simply reflects what is already current law as reflected in Section 6002 of SAFETEA-LU.*

What is your response?

While there are some similarities to section 6002 of SAFETEA-LU, there are also significant differences that make the RAPID Act a more significant reversal of environmental protections.

For example:

- 1) RAPID micromanages lead agencies by setting a 30-day deadline for responding to their invitation to designated participating agencies, SAFETEA-LU leaves deadline-setting at the discretion of the lead;
- 2) SAFETEA-LU protects the integrity and quality of work by qualifying mandated concurrent timing of reviews with caveats, stating they shall be thus performed "to the maximum extent practicable" and "unless doing so would impair the ability of the federal agency to carry out these obligations"; those conditions are not in RAPID.
- 3) RAPID severely limits alternatives analysis with three sections not in SAFETEA-LU, mandating that alternatives not identified by the lead agency shall not be evaluated, alternatives that are "inappropriate" vis-à-vis purpose and need shall not be evaluated and "only feasible alternatives," i.e., ones the project sponsor could undertake shall be evaluated. This tilts the playing field in favor of contractors specializing in one possible solution to a problem. For example, if a traffic problem is at issue and the project sponsor is a highway contractor or FHWA, then this provision will prevent examination of transit or land-use alternatives that may well yield equivalent or better outcomes at a much cheaper cost to taxpayers.
- 4) RAPID explicitly squashes potential dissent by requiring that any comment outside of the schedule set by the lead agency be ignored, which is also not in SAFETEA-LU.
- 5) A "failure to act" on reviews required under other statutes in the time limits specified in RAPID yields a "deemed approved" status for those reviews. This extends far beyond NEPA to hamstring other laws and is also not in SAFETEA-LU.
- 6) SAFETEA-LU includes a requirement that performance be measured, and that assistance be provided to reviewers to ensure they can do their job expeditiously; RAPID has neither of these provisions.

A GAO report¹ on SAFETEA-LU that was published too late for its research to guide the authorization of MAP-21, points out some positive and negative experience with those changes. For instance, GAO notes:

“State DOTs reported that the other SAFETEA-LU provisions GAO studied have both potential benefits and challenges but, in some cases, they identified alternative solutions that could better serve their needs. For example, although respondents indicated that they could save time by implementing the issue resolution process established in SAFETEA-LU, they also noted that the use of written agreements between highway project stakeholders—such as federal resource agencies—could better serve their purposes.”

This example points out that the Federal Highway Administration and other agencies can amend the process with precision as needed to continuously improve the program. For instance, based on positive state experience, DOT has implemented an “Every Day Counts” program that shares states success stories and encourages other states to adopt innovative solutions. FHWA also “developed performance measures for Every Day Counts and is currently collecting data to determine if these initiatives have had a positive impact on expediting highway projects”². For government to be accountable, performance measures are a necessary tool.

5. *In his written testimony, Mr. Duffy cites Massachusetts law in offering a number of suggested legislative changes at the federal level, including consolidating appeals and coordinating permit review time periods with investment incentives.*

What do you think of Mr. Duffy’s suggestions?

NRDC supports the current tax incentives for alternative energy and ending the tax code’s annual sunset of those provisions. As Mr. Duffy notes, the subsidy uncertainty unsettles the market since investors and lenders don’t know the rules that will apply. I would note that the tax incentives for fossil fuels are not subject to these sunsets which unfairly tilt the market against alternative fuels and for the continuing exploitation of carbon-based fuels. Therefore, we oppose the bias in the current tax law and recommend that the incentive not end on an arbitrary date.

Requiring consolidated appeals is unnecessary and could have adverse consequences. If there are multiple federal approvals, the permits and NEPA challenges may not line up simultaneously. Often, despite the best of intentions of the bill’s sponsors, permits could be settled early in the process while the NEPA process is just getting started – or vice versa. For instance, in the Secure Energy example in question #1, when the air permit is issued in 4 months while the NEPA process is presumably just getting started, the project sponsor may want to challenge that permit immediately. Would a consolidated requirement make the sponsor wait until all the other approvals are final agency actions?

¹ <http://www.gao.gov/products/GAO-12-593>

² *Ibid.*

There are good reasons for these existing rules. For example, each separate agency decision has to be supported by its own administrative record. If the cases were consolidated, the court would still be effectively hearing a lot of separate lawsuits; they would simply all be heard by the same judges. Under existing law, certain approvals might have to be challenged within 30 or 60 days. A plaintiff might have longer to challenge other approvals. Applying a short deadline to all challenges could force plaintiffs to bring suit prematurely, without adequate time to develop the case, and perhaps without time enough even to decide whether the case is worth bringing.

With regard to shortening the statute of limitations (SOL) to file a claim, NRDC opposes this on a number of grounds, including the idea that it will have the unintended and perverse effect of actually increasing the number of claims filed as plaintiffs rush to the courthouse to preserve their right. There is no evidence that the 6 year limit has been abused. (i.e., cases filed near the end of the present statute of limitations which is six years). Again, changing the SOL is addressing a problem that does not exist.

If a project is challenged and the timing of various permits and reviews does line up, courts are able to consolidate cases under their present authority.

Again, addressing the litigation tied to NEPA cases will not have an impact on all but a handful of cases. Taking one outlier, Cape Wind, as a rationale to dramatically amending the APA and effectively amending NEPA, is fraught with unintended consequences. NEPA's critics exaggerate the volume of litigation arising under this statute. Because agency compliance with NEPA is now generally quite good, NEPA generates a relatively small volume of litigation. Federal agencies prepare approximately 50,000 EAs each year, plus another 500 draft, final and supplemental EISs for the much smaller number of "major" federal actions. Aggrieved parties typically file about 100 NEPA lawsuits per year, representing only 0.2% of the actions generating NEPA documents annually. Not surprisingly, given the broad range of interests involved in the NEPA process, the types of plaintiffs that bring NEPA lawsuits cover the waterfront, including state agencies, local governments, business groups, individual property owners, and Indian tribes, as well as environmental organizations.

6. *While I understand that you challenge the very premise underlying the RAPID Act, if there is one provision of the RAPID Act that is guaranteed to become law, which provision would you rather it be?*

Of the bill's provisions, subsection (e) is the least harmful to the process. Although the section creates some confusion between participating agencies and cooperating agencies, and paragraph (4) would undercut the ability of underfunded agencies to have a say if they miss the deadline, the amount of harm this provision would cause may not be irreparable. The necessity or value of even some of these provisions is a bit dubious. For instance, restricting agencies commenting outside their area of expertise or if they miss a deadline seems questionable. For example, the Air Force opposed a project that they thought was too close to their flight patterns and commented about that, along with the problem of waste disposal for the proposed project. Would the Air Force only be allowed to comment on the first issue and hope that EPA would bring up the other critical concern since it is not part of the Defense Department's mission? That

doesn't seem helpful. Before including this deadline cutoff, the Committee should inquire if agencies are offering superfluous or frivolous comments.

7. *If you could strike only one provision from the RAPID Act, which provision would it be?*

The subsection deeming approval of permits and licenses. This provision repeals key sections of the Atomic Energy Act, the Clean Water Act, and the Clean Air Act and will allow industries to pollute with impunity.

